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CLERK

IN THE

Supreme Court of the United States

SPRING TERM, 1987

NO. _____

DIRK VINCENT TERRY,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS, THE STATE OF TEXAS

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12 pp

QUESTION PRESENTED

Whether the Court of Appeals decision, depriving Petitioner of appellate review of the merits of his challenge to the indictment, denies Petitioner due process of law within the meaning of the Fourteenth Amendment to the United States Constitution, *Evitts v. Lucey*, ____U.S.____, 105 S. Ct. 830, ____L.Ed.2d____ (1985), and *Entsminger v. Iowa*, 386 U.S. 748, 87 S. Ct. 1402, 18 L.Ed.2d 501 (1967), when review of the merits is dependent on the transcript containing the written Motion to Quash, and the transcript does not contain the motion, although required by State law, because of a clerical error by the Harris County District Clerk, because of ineffective assistance of appellate counsel in failing to object to the omission in the transcript, and because of the Court of Appeals refusal to allow the appellate record to be supplemented.

PARTIES TO THE PROCEEDING BELOW

Joint Appellants Below:

Dirk Vincent Terry (Petitioner herein)

Henry Martin Smith a/k/a Don Emmons

Appellee below:

The State of Texas (Respondent herein)

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The opinion of the Texas Court of Criminal Appeals is reported at ___S.W.2d____, No. 157-84 (Tex. Crim. App. October 15, 1986), and is attached as Appendix "A".

The first decision of the Texas Court of Criminal Appeals, which was withdrawn by the opinion listed above, was *Terry v. State,* No. 157-84 (Tex. Crim. App. June 11, 1986), and is attached as Appendix "B".

The opinion of the Court of Appeals of Texas for the Fourteenth Supreme Judicial District is reported as *Smith v. State,* 681 S.W.2d 71 (Tex. App.—Houston [14th Dist.] 1983), and is attached as Appendix "C".

JURISDICTIONAL STATEMENT

The judgment of the Court of Criminal Appeals was rendered on October 15, 1986. The order of the Court of Criminal Appeals overruling Petitioner's Motion for Rehearing was entered on November 26, 1986. There have been no extensions of time within which to petition for a writ of certiorari, and this is not a cross-petition for a writ of certiorari.

This Court has jurisdiction pursuant to 28 U.S.C. sec. 1257(3) (West 1966), to review the judgment of the Texas Court of Criminal Appeals by Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the United States Constitution, Tex. Code Crim. P. Ann. art. 40.09 (Vernon 1979), Tex. Code Crim. P. Ann. art. 44.02 (Vernon 1979), and Tex. R. App. P. 40, 51, 53, 55, and 56. These are set out in their entirety in Appendix "D".

STATEMENT OF THE CASE

Petitioner perfected his appeal of his conviction for securing execution of a document by deception[1] on May 27, 1982.[2] The appellate record was approved by the trial court on December 17, 1982, and filed in the Court of Appeals of Texas for the Fourteenth Supreme Judicial District on January 4, 1983.[3] On March 17, 1983, Petitioner filed his brief in the Court of Appeals. His fifteenth ground of error complained of the action of the trial court in overruling his Motion to Quash the Indictment. Even though the transcription of the court

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1. *See* Tex. Penal Code, sec. 32.46 (Vernon 1974), which provides:

> (a) A person commits an offense if, with intent to defraud or harm any person, he, by deception, causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.
> (b) An offense under this section is a felony of the third degree.

2. Petitioner gave oral notice of appeal as allowed by Tex. Code Crim. P. Ann. art. 44.08(a) (Vernon 1979) (repealed by Acts 1985, 69th Leg., Ch. 685, p. 5136. *Now see* Tex. R. App. P. 40(b)(1), effective September 1, 1986), which requires that all notice of appeal be written.

At the time of Petitioner's appeal, Chapter 40 and 44 of the Texas Code of Criminal Procedure were applicable. Although parts of both chapters were modified between 1982 and 1986, effective September 1, 1986, all appeals in Texas, civil and criminal, are governed by the Texas Rules of Appellate Procedure. Unless noted otherwise, all references to the Texas Code of Criminal Procedure are to the portions in effect at the time of petitioner's appeal, and all references to the Texas Rules of Appellate Procedure are to those currently in effect.

3. *See* Tex. Code Crim. P. Ann. art. 40.09, sec. 7 and 8 (Vernon 1979) (repealed). *Now see* Tex. R. App. P. 51 and 53, which provide for approval of the record by the Court of Appeals rather than the trial court.

Prior to approval of the record by the trial court, petitioner's counsel twice objected to the record, on the grounds that the record did not contain the statement of facts.

reporter's notes reflected that a written Motion to Quash had been filed, Petitioner's ground of error called attention to the absence of the Motion to Quash in the transcript and stated his intention to seek a supplementation order from the Court of Appeals.[4]

On March 28, 1983, prior to the State filing its brief, submission, and oral argument, Petitioner filed a Motion to Supplement the Appellate Record in the Court of Appeals. It requested that the written Motion to Quash the Indictment be made a part of the record.[5] The State of Texas, Respondent herein, filed written opposition to the Motion, and a panel of the Court of Appeals denied the Motion.[6]

On June 2, 1982, Petitioner filed, in the trial court, a Motion to Supplement the Appellate Record.[7] The trial court granted the motion, had a supplemental transcript prepared, and forwarded the same to the Court of Appeals where it was received and filed.[8] Respondent filed a Motion to Void the Supplemented Transcript, Petitioner objected in writing, and the Court of Appeals ordered the Supplemental Transcript stricken.[9] The Court of Appeals then overruled Petitioner's ground of error, because the Motion to Quash was not before them, and

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4. *See* Appendix H, and Appendix B, slip opinion at page 3.

5. *See* Appendix K, and *Smith v. State,* 681 S.W.2d at 77.

6. *See* Appendix K, and *Smith v. State,* 681 S.W.2d at 77.

7. Tex. Code Crim. P. Ann. art. 40.09, sec. 7 and 12 (Vernon 1979) (repealed). Now, Tex. R. App. P. 55 and 56, which provide for exclusive jurisdiction in the Court of Appeals for supplementing the appellate record. *See* Appendix F.

8. *See* Supp. Tran. at 8-10, 23, and Appendix F.

9. *See* Appendix L, and *Smith v. State,* 681 S.W.2d at 77.

because nothing was, therefore, presented for review.[10] Petitioner's Motion for Rehearing was overruled by the Court of Appeals without opinion.[11]

Petitioner's Petition for Discretionary Review, hereafter "p.d.r.", was granted by the Texas Court of Criminal Appeals, and on June 11, 1986, the Court of Criminal Appeals reversed the judgment of the Court of Appeals, because it "deprived appellants of their right on direct appeal to obtain a ruling on the merits of their ground of error." Seven judges joined the majority opinion and two concurred only in the result.[12]

On October 15, 1986, the Court of Criminal Appeals withdrew its original opinion, and, in a published per curiam opinion, with one judge dissenting, affirmed the Court of Appeals judgment, because "this Court will not examine those kinds of actions of a Court of Appeals by way of [p.d.r.]."[13] Appellant's Motion for Rehearing was subsequently overruled on November 26, 1986.

The Court of Criminal Appeals second opinion has no more practical effect than a summary refusal of Petitioner's p.d.r. That is, it merely holds that the Court will not review decisions of the Court of Appeals regarding such matters.[14] Therefore, in effect, this Writ

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10. *Smith v. State*, 681 S.W.2d at 78.

11. *See* Appendix M, and Appendix B, slip opinion at 2.

12. *See* Appendix B, slip opinion at 4.

13. *See* Appendix A, slip opinion at 2.

14. This is much like *Evitts v. Lucey*, where the Court noted that "Petitioner sought discretionary review in the Supreme Court of Kentucky, but the judgment of the Court of Appeals was affirmed in a one sentence order." 105 S. Ct. at 833. Unlike Kentucky, in *Evitts v. Lucey*, Texas does not allow the trial court to vacate the judgment, or grant any other relief, subsequent to the mandate of the Court of Criminal Appeals. *See Berry v. Hughes*, 710 S.W.2d 600 (Tex. Crim. App. 1986).

of Certiorari is from the opinion of the Court of Appeals, even though it is sought from the judgment of the Court of Criminal Appeals.

Petitioner contends that a substantial federal question, as discussed herein, was raised in the Court of Appeals. In its opinion, the Court of Appeals justified its holding interpreting Tex. Code Crim. P. Ann. art 40.09(7), because "we believe the orderly administration of justice commands this rule."[15] This was the precise rationale advanced by the dissent, and rejected by the majority, in *Evitts v. Lucey*. Indeed, the Court of Criminal Appeals recognized, in its original opinion, that this, standing alone, was insufficient, when it held that the Court of Appeals judgment "deprived appellants of their right on direct appeal to obtain a ruling on the merits of their ground of error."[16] Moreover, Judge Teague's dissent, in the Court of Criminal Appeals second opinion, points out that the highest Texas Court has traditionally and consistently followed *Henry v. Missississi*, 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed.2d 408 (1965), in recognizing that "appellate courts are no longer bound in all cases to confine themselves to the record sent up from the trial court."[17]

Accordingly, this case squarely presents the same issues as *Evitts v. Lucey, and Entsminger v. Iowa*. That is, whether petitioner is denied Due Process of law when the merits of his appeal are disregarded: (1) due to a clerical omission by the Harris County District Clerk in failing to include the motion to quash in the transcript,

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15. *See* Appendix C, and *Smith v. State*, 681 S.W.2d at 78.

16. *See* Appendix B, slip opinion at 4.

17. *See* Appendix A, slip opinion at 6. (Teague, J., dissenting).

even though State law required it to be included in the transcript, when the motion is necessary to appellate review of the merits of petitioner's appeal;[18] (2) due to the failure of his appellate counsel to object to the omission, from the transcript, of the subject motion necessary for a review of the merits;[19] and (3) due to the Court of Appeals refusal to allow the appellate record to be supplemented, by initially overruling petitioners motion to supplement, and then by ordering the supplemental transcript that it had previously received and filed, as sent to it by the trial court, stricken and returned to the trial court.

ARGUMENT AND REASONS FOR GRANTING OF WRIT

In *Evitts v. Lucey,* this Court held that:

> A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed. A State may not extinguish this right because another right of the appellant—the right to effective assistance of counsel—has been violated.

(105 S. Ct. at 838).

By statute, the State of Texas guarantees all defendants convicted in the state courts an appeal as a matter of right. Tex. Code Crim. P. Ann. art. 44.02 (Vernon 1979). Indeed, the right of a convicted defendant to

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18. *See* Tex. Code Crim. P. Ann. art. 40.09, sec. 1 (Vernon 1979) and *Smith v. State,* 681 S.W.2d at 78.

19. *See Smith v. State,* 681 S.W.2d at 77, and Appendix A, slip opinion at 2.

appeal is guaranteed by the Texas Constitution. TEX. CONST. Art. 5, sec. 5 (Vernon 1984).

Moreover, at the time of Petitioner's appeal, state law guaranteed that, as part of the appellate process:

> "the clerk of the court that entered the conviction sought to be appealed from *shall,* under his hand and seal of the court, make and prepare an appellate record comprising a true copy of the matter designated by the parties, *but shall always include whether designated or not,* copies of the material pleadings, material docket entries made by the court, the charge, verdict, judgment, sentence, notice of appeal, any appeal bond, *all written motions and pleas and orders of the court,* and bills of exception." (emphasis added)

Tex. Code Crim. P. Ann. art. 40.09 sec. 1 (Vernon 1979) (repealed)[20] Indeed, Texas law has long recognized that a Motion to Quash falls within art. 40.09, sec.

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20. This section was amended by Acts 1983, 68 Leg., Ch. 329, p. 1730, sec. 1, effective August 29, 1983. *See* Tex. Code Crim. P. Ann. art. 40.09, sec. 1 (Vernon 1986). The amended version of this article is substantially similar to the prior version, except that it deletes the language requiring the district court clerk to include all motions, pleas, and rulings thereon, unless designated by the appellant, for inclusion in the appellate record. Art. 40.09, sec. 1 was repealed effective September 1, 1986, *see* note 2, *supra.* As noted by the Court of Criminal Appeals in its second opinion, the provisions of Tex. R. App. P. 55(b), make it unlikely that the scenario in this cause will be repeated, because Rule 55(b) provides that "the appellate court *shall* permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal." Although Texas Law now provides a measure of protection which was not available to Petitioner at the time of his appeal, it clearly recognizes the fundamental balance envisioned by *Evitts v. Lucey,* which requires that, unless there are compelling reasons for the State to deny appellate review, such review should be accorded the critically importance status necessary to provide an appellant with due process of law.

1's, parameters of "all written motions." *Chancelor v. State*, 508 S.W.2d 638, 640 (Tex. Crim. App. 1974).

In *Entsminger v. Iowa*, 386 U.S. 748, 87 S. Ct. 1402, 18 L.Ed.2d 501 (1967), this Court unanimously held that the failure of appellate counsel to file with the appellate court that portion of the record necessary for a review of the merits of the appeal, without the consent or knowledge of the appellant, and the state procedures which perpetuated the attorney's error, denied the petitioner his constitutionally protected right to receive "the benefit of a first appeal with a full printed abstract of the record, briefs, and oral argument, as was his right under [state] law."[21]

In *Evitts v. Lucey*, the Court recognized that *Entsminger*, *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L.Ed. 891 (1956), and *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L.Ed.2d 811 (1963), involved due process concerns "because the states involved had set up a system of appeals as of right, but had refused to offer each defendant a fair opportunity to obtain an adjudication of the merits of his appeal." 105 S. Ct. at 841. That is, "the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right, certain minimum safeguards necessary to make that appeal 'adequate and effective'." *Evitts v. Lucey*, 105 S. Ct. at 834, *Griffin v. Illinois*, 351 U.S. at 20, 76 S. Ct. at 591.

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21. Petitioner recognizes that *Entsminger* was primarly an equal protection case. However, *Evitts v. Lucey*, clearly held that *Entsminger*, as well as others in its line, draws "some support . . . from the equal protection clause of the Fourteenth Amendment, and some from the due process clause of that amendment." *Evitts v. Lucey*, 105 S. Ct. at 840, citing *Ross v. Moffitt*, 417 U.S. 600, 608-609, 94 S. Ct. 2437, 2442-43, 41 L.Ed.2d 341 (1974).

In the instant case, the State of Texas not only guarantees a right of appeal, but also guarantees that certain matters will be included in the transcript. It is undisputed that the Motion to Quash, necessary for Petitioner to receive review on the merits of his appeal, was not included in the transcript, even though state law required that it be included in the transcript.

Moreover, both the Court of Appeals and the Court of Criminal Appeals made conspicuous reference to the failure of Appellant's counsel to object to the filing of the transcript on the basis that it did not contain the Motion to Quash. See *Smith v. State*, 681 S.W.2d at 77 and *Terry v. State*, (second opinion) slip op. at 2.[22]

Be that as it may, and despite the lack of an objection, Petitioner's counsel attempted to supplement the appellate record with the material which art. 40.09 sec. 1, gave Petitioner the right to have included in the transcript without request or designation. Specifically, Petitioner's counsel requested the Court of Appeals to order the supplementation, and when that failed, requested the trial court to order the supplementation pursuant to Tex. Code Crim. P. Ann. art. 40.09 sec. 7 and 12. After the Court of Appeals had received and filed the supplemental transcript, it was stricken and ordered returned to the trial court on the basis of the State's Motion to

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22. Presumably, these were references to Tex. Code Crim. P. Ann. art. 40.09, sec. 2 (Vernon 1979), which provides that "the failure of the clerk to include designated matter will not be ground for complaint on appeal if the designation specifying such matter be not filed with the clerk within 60 days after notice of appeal is given." *See Nethery v. State*, 692 S.W.2d 686, 701 (Tex. Crim. App. 1975); *Vanderbilt v. State*, 629 S.W.2d 709, 717 (Tex. Crim. App. 1981). It was apparently overlooked that art. 40.09, sec. 2 only requires objection to matters which must be designated.

Strike. The sole justification given by the Court of Appeals was that, "we believe that the orderly administration of justice commands this rule."

This rationale was expressly rejected by this Court in *Evitts* and *Entsminger*.[23] Indeed, in *Evitts,* this Court made it patently clear that, before the ultimate sanction of failing to review the merits of the appeal could be imposed, without impermissably infringing on the appellants due process rights, other less burdensome sanctions, more directly related to the injury inflicted on the interest of the government by the omission of the attorney, must be afforded an opportunity to vindicate the injury to the State's interest. *Evitts,* 105 S. Ct. at 837-838.

Here, no alternative sanctions or remedies were attempted by the Court of Appeals. Rather, the Court of Appeals frustrated all attempts to cure the error, through judicial gyrations which were certainly not in the interest of the "orderly administration of justice." Their actions were taken in spite of the fact that the initial error, that caused the motion to be missing from the transcript, was the result of a clerical error by the Harris County District Clerk, and was not the fault of either appellant or his counsel.

In the instant case, Petitioner was denied due process of law. First, the Harris County District Clerk failed to perform his statutorily required function, by omitting the Motion to Quash from the appellate record. Second, Appellant's counsel failed to object to the omission of

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23. Appellant recognizes that the Court of Appeals did not have the benefit of this Court's opinion in *Evitts v. Lucey,* but *Entsminger v. Iowa,* to which the Court of Appeals' actions most closely resemble, had been the law for nearly 16 years.

the Motion to Quash, from the transcript, even assuming that State law required him to do so. Finally, the Court of Appeals compounded what it could have and, indeed, was constitutionally bound to simplify and correct, by not only denying the Motion to Supplement, but also, by ordering the supplemental transcript stricken once the trial court had ordered the record supplemented as allowed by state law.

These errors, individually and cumulatively, regardless of the label placed on them, denied Petitioner any appellate review of the merits of his complaint in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION AND PRAYER

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Texas Court of Criminal Appeals, and that said judgment be reversed and the cause remanded with instructions to consider the merits of Petitioner's appeal. Alternatively, Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Texas Court of Criminal Appeals, and that said judgment be vacated and the cause remanded for reconsideration in light of *Evitts v. Lucey*.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 1987, three (3) copies of the Petitioner's Petition for Writ of Certiorari were mailed, postage prepaid, to Jim Mattox, Attorney General for the State of Texas, State Capitol, Austin, Texas 78711, and to John Holmes, District Attorney, Harris County, 201 Fannin, Room 200, Houston, Texas 77002. All parties required to be served have been served. I am a member of the bar of this Court.

STANLEY G. SCHNEIDER

APPENDIX

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APPENDIX A

NOS. 156-84 & 157-84

HENRY MARTIN SMITH, a/k/a DON EMMONS,
and DIRK VINCENT TERRY,
Appellants

v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review
from the Court of Appeals, Fourteenth Supreme
Judicial District of Texas
[HARRIS County]

OPINION ON APPELLANTS' PETITIONS FOR DISCRETIONARY REVIEW

The prior opinion of the Court on original submission is withdrawn, and this opinion is substituted for it.

A jury convicted appellants of securing execution of a document by deception and assessed punishment for each at five years confinement and a fine of $2500. The Fourteenth Court of Appeals affirmed the judgment of conviction. Smith v. State, 681 S.W.2d 71 (Tex. App.—Houston [14th] 1983).

We granted ground for review on appellants' petitions for discretionary review to address a procedural issue concerning supplementation of an appellate record by a trial court under former Article 40.09, § 7, V.A.C.C.P., see now Tex. R. App. Pro. Rule 55, and consideration of it by an appellate court. Tex. Cr. App. Rule 302

(c)(1) and (2), now Tex. R. App. Pro. Rule 200(c) (1) and (2).

The chronology of pertinent events leading to the decision of the Houston [14] Court is well documented in the opinion rendered below, and need not be iterated here. See *Smith*, supra, at 77. Relative to preliminary rulings denying supplementation of the record, appellants assert in their ground for review:

> "The decision of the Court of Appeals that the trial court did not have authority to approve a supplemental record containing a motion to quash the indictment filed prior to trial misconstrues Article 40.09, Section 7, V.A.C.C.P. . . ."

They claim the conflicting opinion is Deaton v. State, 642 S.W.2d 247 (Tex. App.—Houston [14th] 1982), no P.D.R. history.

When *Deaton v. State,* supra, is carefully compared with the opinion below, however, there is no conflict. In the instant cause, disdaining authorities cited by the parties, another panel of the Houston [14th] Court disposed of the supplementation issue on a theory somewhat different than that suggested in appellant's ground for review, *viz*:

> "We believe the issue before us is simple and none of the cases cited by either appellants or the state is controlling. We hold that once the appellate record is approved and filed in the appellate court and a motion to supplement that record is then made in the appellate court and the court denies the motion, the trial court does not thereafter have the authority to order the record supplemented."

681 S.W.2d at 77-78. Accordingly, the court ordered the supplemental transcript stricken and returned to the clerk of the trial court. That done, the court found that a motion to quash was not in the record, so "[n]othing was presented for review," and for that reason overruled the relevant ground of error.

Thus the key to its overruling appellants' ground of error is that the court had previously denied appellants' motion to supplement the record. That ruling, as well as its order striking the supplemental transcript, is essentially interlocutory in nature, and we have determined that ordinarily this Court will not examine those kinds of actions of a court of appeals by way of a petition for discretionary review. Measeles v. State, 661 S.W.2d 732 (Tex. Cr. App. 1983). We also observe that though more than one opportunity was afforded for objections to the original record and, indeed, appellants did object in another particular, they never objected to omission of their motion to quash. See Nethery v. State, 692 S.W.2d 686, 701 (Tex. Cr. App. 1985), Vanderbilt v. State, 629 S.W.2d 709, 717 (Tex. Cr. App. 1981), and cases there cited.*

Therefore, the judgment of the court of appeals is affirmed.

PER CURIAM

(Delivered: October 15, 1986)

EN BANC

PUBLISH

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* Given provisions of Tex. R. App. Pro. Rule 55(b). We anticipate the scenario in this cause will not be replayed.

NOS. 156-84 & 157-84

HENRY MARTIN SMITH, AKA DON EMMONS, AND DIRK VINCENT TERRY,
Appellants

v.

THE STATE OF TEXAS,
Appellee

Petition for Discretionary Review
from the Court of Appeals, Fourteenth Supreme Judicial District
[Harris County]

DISSENTING OPINION

Art. 40.09, Section 12, V.A.C.C.P., provides in part: "Whenever the trial court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefore and for the safekeeping, transportation and return thereof as it deems proper . . ." Neither the majority opinion nor the opinion of the court of appeals nor the parties in their briefs allude to or discuss this provision of the law.

I find that, pursuant to Section 12, supra, the trial judge was permitted to send the motions to quash to the court of appeals at any time prior to submission, which he did.

Although the motions to quash the appellants' indictments were transmitted to the court of appeals by the trial judge, by supplementation of the record pursuant to Art. 40.09, Section 7, V.A.C.C.P., rather than Section

12, I see no legal impediment that would have prevented him from sending such papers to the court of appeals pursuent to Section 12, supra. Of course, as to what the court of appeals might have done with the papers once received is another question. However, the issue that is before us is not what the court of appeals might have done with the papers after they had been received by that court, but, instead, is whether the trial judge had the authority to transmit the papers to the court of appeals.

Even before the provisions of Art. 40.09, supra, became effective, this Court in *Culbert v. State,* 415 S.W. 2d 646, 649-650 (Tex. Cr. App. 1967), over strong objections by Judge Morrison and now Presiding Judge Onion, held: "It is noted that the Supreme Court of the United States in its opinion in *Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct. 564 (13 L.Ed.2d 408), set the precedent, that appellate courts are no longer bound in all cases to confine themselves to the record sent up from the trial court," and considered an instrument that had been filed with this Court, apparently sua sponte by the State. Also see the dissenting opinion that Judge Morrison filed in Harden v. State, 417 S.W.2d 170 (Tex. Cr. App. 1967), in which this Court, without citing any authority for its action, requested and received from the clerk of the trial court a photograph that had not been formally offered or introduced into evidence. The photograph also had not been filed in the record before the trial judge approved the record. Nevertheless, it was used to sustain the sufficiency of the evidence.

In this instance, the court of appeals ordered the papers that had been sent it by the District Clerk of Harris County, through the supplementation of the record,

"stricken and returned to the Office of the Harris County District Clerk." In disposing of appellants' ground of error, that the motions to quash should have been granted, the court of appeals chose to ignore the papers that the trial judge had ordered sent to it. I believe that it had authority to do just that.

However, but because of the importance of the issue that appellants' counsel raises, and pursuant to *Henry v. Mississippi*, supra, I would invoke the provisions of Art. 40.09, Section 12, supra, and have this Court direct the clerk of the trial court to send to this Court copies of the motions to quash, and, after reviewing the motions to quash, if this Court believes that the motions to quash have merit, remand the causes to the court of appeals for it to consider appellants' ground of error that is directed to the motions to quash.

TEAGUE, Judge

EN BANC

DELIVERED: October 15, 1986

PUBLISH

APPENDIX B

NOS. 156-84 & 157-84

HENRY MARTIN SMITH, a/k/a DON EMMONS,
and DIRK VINCENT TERRY,
Appellants

v.

THE STATE OF TEXAS,
Appellee

Petitions for Discretionary Review
from the Court of Appeals, Fourteenth Supreme
Judicial District of Texas
[HARRIS County]

OPINION ON APPELLANTS' PETITIONS FOR DISCRETIONARY REVIEW

A jury convicted appellants of securing execution of a document by deception and assessed punishment for each at five years confinement and a fine of $2500. The Fourteenth Court of Appeals affirmed the conviction. Smith v. State, 681 S.W.2d 71 (Tex. App.—Houston [14th] 1983). We granted appellants' petitions for discretionary review to address a procedural issue concerning supplementation of an appellate record by a trial court, and consideration of it by an appellate court. Tex. Cr. App. Rule 302(c)(1) and (2).

The chronology of pertinent events is well documented in the opinion rendered below. See *Smith,* supra, at 77. Appellants gave timely notice of appeal and the record was filed in the court of appeals on January 4, 1983.

On March 28, 1983, after briefs were filed, appellants filed a motion in the court of appeals to supplement the appellate record, requesting that motions to quash the indictments be made a part of the record. The State objected and a panel of the court of appeals denied the motion. Appellants then filed a similar motion with the trial court requesting supplementation of the record by the trial court. The trial court granted the motion and a supplemental transcript was forwarded to the court of appeals; there the State filed a motion seeking to avoid the supplementation. For reasons stated in its opinion the court of appeals granted the State's motion and ordered the supplemental transcript "stricken and returned to the Office of the Harris County District Clerk." Then, finding "nothing is presented for this court to review," the court of appeals overruled the ground of error. *Smith*, supra, at 77-78.

The rulings of the court of appeals were assailed by motion for rehearing, in which appellants requested that the court withdraw its original opinion and "proceed to address the merits of his contention as to the trial court's ruling on the motion to quash the indictment." Under their ground for review appellants contend that with their motion to quash being before the court of appeals, the court should have considered it in deciding their ground of error. Putting aside the issue of authority in the trial court under Article 44.09, § 7, V.A.C.C.P., Armstead v. State, 692 S.W.2d 99 (Tex. Cr. App. 1985), since the court of appeals did also, we treat refusal of the court of appeals to consider the supplemental transcript from the clerk of the trial court.

Disdaining authorities cited by the parties, the court of appeals disposed of the issue on a somewhat different theory, *viz:*

> "We believe the issue before us is simple and none of the cases cited by either appellants or the state is controlling. We hold that once the appellate record is approved and filed in the appellate court and a motion to supplement that record is then made in the appellate court and the court denies the motion, the trial court does not thereafter have the authority to order the record supplemented. . . . Accordingly, we grant the 'State's Motion to Declare Void Appellants' Supplementation of the Records.' "

Concomitantly, the court ordered the supplemental transcript stricken and returned to the clerk of the trial court. That done, the court pronounced:

> "The record before this court does not contain a motion to quash. Nothing is presented for review. Appellants' . . . point of error is overruled."

The result reached by the court of appeals is premised on the fact that it had previously denied appellants' motion to supplement the record. Let us examine the prior ruling by the court.

The transcription of notes of the court reporter shows that a motion to quash had been filed and a pretrial hearing was presented and argued; each paragraph of the indictment was attacked for sufficiency in alleging a particular offense, and argument on the merits was made to the court. Under the ground of error complaining of overruling the motion to quash appellants called

attention to absence of the motion in the transcript and stated their intention to seek a supplementation order from the court of appeals.

When appellants then filed their motion to supplement the record by including their motions to quash, they invoked the jurisdiction of the court of appeals to grant the motion. The State resisted the motion, and asserts that its "*strong opposition* to that portion . . . pertaining to supplementing the appellate records with matters which the appellants had failed to designate" was based on the theory that "appellant's were circumventing the requirement of Article 40.09(2), V.A.C.C.P." (State's emphasis). However, a motion to quash and the ruling thereon are included within "all written motions and . . . and orders of the court" which § 1, Article 40.09, mandates the clerk to include in the appellate record, "whether designated or not." Chancelor v. State, 508 S.W.2d 638, 640 (Tex. Cr. App. 1974).

The court of appeals had ample power and authority to order the trial court to cause the record to be thus supplemented pursuant to Article 40.09, § 7, and to direct the clerk of the court to send up original of the motion for its inspection pursuant to *id.*, § 12. Its failure to do either deprived appellants of their right on direct appeal to obtain a ruling on the merits of their ground of error.

We find that the court of appeals erred in denying the motion of appellants to supplement the record, thereby refusing to cause the clerk of the trial court to do that which should have been done in the first place, and when the supplemental transcript was forwarded

to the court, it again erred in ordering it stricken instead of considering the motion to quash to decide the related ground of error.

Accordingly, the judgment of the Houston (14th) Court of Appeals is reversed and the cause is remanded to that court for further proceedings consistent with this opinion.

CLINTON, Judge

(Delivered June 11, 1986)

EN BANC

PUBLISH

Teague & Campbell, JJ., concur in result

APPENDIX C

Henry Martin SMITH and Dirk Vincent Terry,
Appellants,

v.

STATE of Texas,
Appellee.

Nos. B14-82-392-CR, A14-82-397-CR

Court of Appeals of Texas,
Houston (14th Dist.).

Nov. 17, 1983.

Rehearing Denied Dec. 22, 1983.

Discretionary Review Granted June 27, 1984.

Defendants were convicted in the District Court, Harris County, Michael McSpadden, J., of securing execution of a document by deception, and they appealed. The Court of Appeals, Robertson, J., held that: (1) evidence was sufficient to support convictions; (2) prosecuting attorney's comments that there were at least 55 to 60 former customers of defendants' home improvement company was not improper; even assuming comment was improper, any error was cured by instruction to disregard; (3) jury charge which allegedly required jury to find that defendant acted with intent to defraud or harm, without specifying person toward whom that intent was directed, if error, was not fundamental error; (4) trial court could not grant motion to supplement appellate

record to make defendants motion to quash indictments part of the record; and (5) defendant was not in custody at time his interview with assistant district attorney was videotaped.

Affirmed.

Terry Collins, Larry Urquhart, Houston, for appellants.

Calvin Hartmann, Asst. Dist. Atty., Houston, for appellee.

Before PAUL PRESSLER, ROBERTSON and CANNON, JJ.

OPINION

ROBERTSON, Justice.

Although indicted separately, appellants were jointly tried for the offenses of securing execution of a document by deception as proscribed by the TEX. PENAL CODE ANN. § 32.46 (Vernon 1974). The jury rejected their pleas of not guilty, found each guilty on four counts alleged in their respective indictments and assessed punishment for each at confinement for a period of five years and a fine of $2,500 on each count. The appeals have been consolidated. Appellants raise twelve identical grounds of error concerning sufficiency of evidence, jury argument, charge to the jury, admissibility of evidence, sufficiency of the indictments, and a motion to suppress evidence. Appellant Terry raises four additional grounds of error attacking the sufficiency of the evidence to establish, under each count of the indictment, his criminal responsibility for the offenses. We affirm.

There being an attack upon the sufficiency of the evidence it will be set out in some detail. As background information, the evidence shows and the jury was entitled to believe, that appellant Terry owned a business called "National Home Improvement Program." An advertisement for such business appeared in the T.V. Guide of the Houson Chronicle for some period of time. The ad, measuring some 4 x 5 inches and complete with a picture of Uncle Sam, the American flag and stars, carried in bold print the words "APPROVED HOME IMPROVEMENT LOANS", *"NO ONE REJECTED,"* and in bolder print "BAD CREDIT NO CREDIT." Further the ad stated "NO DOWN PAYMENT," "NO REJECTS HERE," "WE HAVE AN APPROVED *LOW INTEREST* IMPROVEMENT LOAN FOR YOU," *"EVEN IF YOU DON'T HAVE A JOB."* (Emphasis in ad). Improvements carried in the ad were siding, insulation, trim, overhang, roofing, air conditioning, carpet, aluminum replacement windows, "etc." Finally, the ad represented the National Home Improvement Program operated in "Texas, Louisiana, Georgia, Florida Districts." No address was given for the company and the only telephone number given was that of a telephone answering service. Over a period of several months numerous people (some fifty-five to sixty customers according to the representation of appellant Terry in a recording) answered the ad. In the beginning appellant Terry called personally upon some of the people answering the ad, but subsequently appellant Smith was hired and trained by Terry as the salesman to call upon the prospective customers. Appellant Smith did not use his own name when soliciting contracts, but instead used the name "Don Emmons," "Dirk Terry," "Don Edmonds" or "Don Hammonds." The jury was

authorized to believe that the only customers of National Home Improvement Program were those who either answered the T.V. Guide advertisement or another person referred by such customer. The jury was further authorized to find that telephone calls to the answering service made subsequent to some of the work contracted to be done had been completed were generally not returned.

In addition to the testimony of the four complainants named in the indictments, the state additionally called twelve other persons who testified concerning the details of other similar transactions. In each transaction the facts are almost identical; a general statement of the method of operation will suffice. A financially disadvantaged person who desired some specific work on his home would answer the ad. Of the sixteen complainants, seven identified Terry as the person who came to their home to discuss the improvements. On one of these transactions Smith accompanied Terry. The other nine identified Terry (who identified himself to them as either Edmonds, Terry, Emmons or Hammonds), as the person who called upon them. Representations were made by either Terry or Smith in nine of the transactions that their program was connected with "the government." Without exemption the sales pitch was identical. The complainant would tell the salesman the work desired; the salesman would represent that work could be done but "to qualify" it was necessary to have "additional work" done. The "additional work" to be done was usually a roof, central air conditioning or siding. It was explained to the customer that it was a "package deal" for a certain price for all of the repairs but some of the repairs (usually the air conditioning or the roof or the siding) would be written in a "contract" (for the total agreed

price for all of the repairs). The majority of the work was written in a "proposal" (which was to be done at a ridiculously low price). (It was generally explained that it was necessary to follow this procedure as collateral was necessary for some of the work and the remainder of the work was being done on a "signature loan.") It was explained to the customer that the work would be done in "phases"—the first being that covered by the contract. The other work was never done. The salesman (Terry or Smith) calling upon the customer explained the need for a notary signature to the contract and completion certificate, but received the approval for the notary to sign later. Additionally, the salesman explained to the customer that he would receive a telephone call from a financial company in Fort Worth and he should acknowledge the work had been completed and he had appeared before the notary. Subsequently, a "Mechanics and Materialmen's Lien Contract" for the total amount of the contract price would be filed in the office of the county clerk. Each of the complainants testified that had they known all of the work represented to be done would not be done, they would not have signed the contract. As a result of the deceptive practices of appellants, some of the customers bound themselves for costs of, for instance, $21,000 for a central air conditioning system, and another, $21,000 for a roof (which the complainant knew, alone, would cost about $1,500).

[1] In their first ground of error appellants attack the sufficiency of the evidence to sustain their convictions under count three of the indictmennts since Walter Buhl, the person alleged to have been deceived into executing the retail installment contract did not testify. A copy of the retail installment contract signed by both

Mr. & Mrs. Buhl shows the name of the buyer to be Walter T. Buhl and wife Odeal. Mrs. Buhl testified, without objection, that there was no way she or her husband would have signed the contract if they had known that the other work promised would not be provided. Appellants declined to cross-examine Mrs. Buhl so as to show her testimony was not based on her personal knowledge. Mrs. Buhl was competent to testify as to her state of mind when she signed the contract and to give her opinion as to her husband's state of mind as she observed him sign the contract. Thus, we find there to be sufficient evidence to sustain the appellants' convictions under count three of the indictments. Appellants first ground of error is overruled.

[2, 3] In grounds of error two through five, appellant Terry alleges that the evidence is insufficient to establish his criminal responsibility for the offenses with which he is charged. The state had the burden of showing that appellant Terry acted with the intent to promote or assist the commission of the offense by soliciting, encouraging, directing, aiding, or attempting to aid appellant Smith in commiting the offense. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974). The court may look to events before and after the commission of an offense in order to determine whether an individual is a party to the offense and bears criminal responsibility therefor. Even circumstantial evidence may be sufficient to show one is a party to an offense. *Freeman v. State,* 654 S.W.2d 450, 454 (Tex. Crim. App. 1983). The evidence brought out at trial established that: 1) Appellants Smith and Terry were long time friends, having gone to school together; 2) Terry trained Smith in the home improvement business; 3) Terry owned and oper-

ated the National Home Improvement Company; 4) Terry's company was paid for work done on the Parker, Buhl, Derbigney, and Kahlin residences; 5) Terry himself signed at least one of the above customers retail installment contracts. Further, the "Mechanics and Materialmen's Lien Contract with Power of Sale" obtained in each of the transactions with the Parkers, Buhls, Derbigneys and Kahlins was before the jury. Each was signed "Dirk Terry contractor/seller." Each instrument shows National Home Improvement Program sold "that certain indebtedness described in the foregoing Mechanics and Materialmen's contract with Power of Sale, together with the lien securing same" to Reliable Capital Corporation. Each assignment was signed "Dirk Terry" and acknowledged before "Julie M. Terry". (Appellant acknowledged his wife's name was Julie). Finally, there was evidence before the jury that when Terry, in responding to an inquiry from the Consumer Fraud Division of the Harris County District Attorney's office, went there to explain his side of the complaints the office had received from consumers, he denied that Henry Martin Smith and Don Emmons were the same person and stated that Don Emmons had been terminated "three or four weeks before" and that he didn't know his whereabouts. In fact, Smith (Emmons) had accompanied Terry to the District Attorney's office, had remained in the lobby area while Terry talked to the assistant district attorney, and was subsequently identified and arrested. (When the two were brought face to face, Terry refused to acknowledge Smith.) There was even evidence that when the authorities went to Terry's home to execute an arrest warrant he refused for an extended period of time to answer their knock and calls to him and only

when the officers threatened forcible entry did he open the door. When the sufficiency of the evidence is challenged, we view the evidence in the light most favorable to the verdict. We conclude that the evidence was abundantly sufficient to show that appellant Terry did, with intent to promote or assist the commission of the offense, solicit, encourage, direct, aid, or attempt to aid appellant Smith in committing the offense. Therefore, grounds of error two through five are overruled.

[4] In grounds of error six through nine, appellants claim the evidence is insufficient in counts two through five of their indictments to establish that execution of the retail installment contracts reproduced in the indictments "affected" property owned by those named in the indictments, respectively: Parker, Buhl, Kahlin, and Derbigney.

Mr. Parker, Mrs. Buhl, Mr. Kahlin, and Mr. Derbigney each referred to the homes covered by the pertinent retail installment contracts as "my home" or "my house." The evidence clearly shows that appellants would not do business with a customer who did not have a deed to his or her house. Each of the complainants occupied the properties in question and the presumption that one in possession is vested with title was not rebutted by appellants. *Whittle v. Johnston*, 392 S.W.2d 867 (Tex. Civ. App—Texarkana 1965, writ ref'd n.r.e.). Appellants' contentions are not well taken.

[5] Secondly, appellants contend the state failed to prove the installment contracts affected property of the complainants. By the terms of the statute, the offense is completed when a person causes another to execute

a document "with the intent to defraud or harm. . . ." There is no requirement that the state prove the resulting harm. Each contract in question explicitly stated it was a "Home Improvement Agrement" and dealt with the installation of central air-conditioning in three instances and a roof in the fourth. Appellants' company is called the National Home Improvement Company. It seems almost too obvious to note that a home improvement contract is a document affecting property. Finally, the contract expressly granted "to Seller a builders Mechanics, Materialmen's and Laborer's lien upon the herein described real property and improvements located thereon." Grounds of error six through nine are not well taken and are overruled.

[6] In ground of error number ten, appellants contend they were denied a fair trial because of the prosecuting attorney's comment that:

> . . . There are at least fifty-five to sixty former customers of National Home Improvement Program. You have heard the testimony from fourteen. You know that this trial could have been a lot longer. . .

Appellants claim that even though the objection was sustained and the jury instructed to disregard it, the error was not cured. We disagree. First, there was some evidence through Terry's taped admission as to this number of contracts. Further, there was testimony that some "60 or 70 or 80" abstracts on work performed by National Home Improvement Program were received from the abstract company. This was some evidence that there were many more contacts than the jury had heard evidence on. However, assuming the impropriety

of the comment, the instruction to disregard would be sufficient unless the remark was clearly calculated to inflame the minds of the jury and was of such a character to suggest the impossibility of withdrawing the impression produced on the minds of the jury. *Lopez v. State,* 643 S.W.2d 436 (Tex. App.—Corpus Christi 1982, pet. ref'd). We do not believe the prosecutor's breach to be this egregious. Any error was cured by the court's instruction to disregard. *Thomas v. State,* 578 S.W.2d 691 (Tex. Crim. App. 1979). Appellants' tenth ground of error is overruled.

[7] In ground of error eleven, appellants assert that the charge was fundamentally defective because it "merely required the jury to find that the appellant acted with the intent to defraud or harm, without specifying the person toward whom that intent was directed." For example, in pertinent part, Count Two of the indictment reads: "with intent to defraud and harm, JOHN A. PARKER, hereinafter styled the Complaintant cause by deception the Complainant to sign," whereas in the corresponding charge to the jury the allegation is phrased: "did intentionally with the intent to defraud or harm, and by deception cause JOHN A. PARKER to sign. . . ." The charge required the jury to find each essential element under the Penal Code. We think it obvious from a common sense reading that the only person appellant could have intended to defraud or harm was the complainant. *See Hawkins v. State,* 656 S.W.2d 70 (Tex. Crim. App. 1983). However, even if error it was not calculated to injure the rights of appellants or deprive them of a fair and impartial trial. Therefore, no fundamental error is shown and ground of error number eleven is overruled.

[8] Grounds of error twelve through fourteen present appellants' contention that the trial court erred in permitting the prosecuting attorney to bolster the testimony of state witnesses: Parker, Buhl, and Bibbs during his cross-examination of defense witness Garza. Each of the state's witnesses testified on cross-examination to having made a statement to a Capital Reliable Corporation representative to the effect that there was further work to be done on their respective homes. Following this statement the defense attorney made essentially the same remark to state witnesses Parker, Buhl, and Bibbs: "So, if the conversation (taped) between you and, let's say Mr. Carlos Garza the Capital Reliable Corporation, shows that you did not say anything like that, then you're mistaken in what you're saying here today?"

When Mr. Garza was cross-examined by the prosecutor he was questioned as to the content of his conversation with Parker, Buhl, and Bibbs. We do not characterize this testimony as an attempt to bolster the uncontroverted statements of unimpeached witnesses. Whatever its merit, the defense attorney's remark to each of the witnesses was an attack on the veracity of their statements. Given this impeachment attempt, the complained of testimony was permissible corroboration. It was not clearly calculated to prejudice the appellants. Whatever label is attached to the complained of questioning involving Mr. Garza, we hold that the trial court cured any possible error by its instruction to disregard the remarks. *Thomas v. State*, 578 S.W.2d 691 (Tex. Crim. App. 1979). These grounds of error are overruled.

[9] Appellants argue in ground of error fifteen that the trial court erred in overruling their motions to quash

all counts of the indictments for failure to allege the conduct of the appellants which constituted "deception" and for failure to describe the "affected" property. Omitting the formal allegations, each count of each indictment alleged that each appellant:

> did then and there unlawfully with intent to defraud and harm (the named complainant), hereafter styled the complainant cause by deception the complainant to sign and execute the document duplicated below which affected the complainants' property and pecuniary interest (and there was then attached a photocopy of the complete "Retail Installment Contract.")

We must first address a procedural matter. Notice of appeal for each appellant was given on May 27, 1982. Appellants never designated any material for inclusion in the appellate records pursuant to TEX. CODE CRIM. PROC. ANN. 40.09(2) (Vernon 1981). Objections to the record were twice made because the transcript of the evidence had not been filed, but the record on appeal was finally approved without objection on December 17, 1982 and the record was filed in this court on January 4, 1983. On March 17, 1983, each appellant filed his brief in this court and on March 28, 1983 appellants filed in this court a motion to supplement the appellate record, requesting that motions to quash the indictments be made a part of the record. The state filed written opposition to the motion and a panel of this court denied appellants' motion to supplement. Thereafter, on June 2, 1982 appellants filed a motion with the trial court to supplement the appellate record and requested that motions to quash be forwarded to this court. Thereafter, the trial court granted appellants' motion. (While not that

material to our disposition of this matter, notice was neither given to the state nor was the matter set for hearing). The state has filed a motion in this court "To Declare Void Supplementation of the Records" and appellants have filed written opposition thereto. Basically, the state argues the trial court was without jurisdiction to supplement the appellate record after it was filed in this court. On the other hand, the appellants argue that "Article 44.11 does not prohibit supplementation of the appellate record pursuant to the trial court's authority under Article 40.09(7), V.A.C.C.P." In support of their argument appellants cite numerous cases where appellate records have, in fact, been supplemented by order of the trial court while the case is on appeal, and, even in some instances subsequent to the issuance of the original opinion. Appellants even cite *Deaton v. State,* 642 S.W. 2d 247 (Tex. App.—Houston [14th Dist.] 1982, no pet.) where the appellate record was supplemented over appellants' objection after appellant had filed his brief. However, there this court stated that "[I]f we assume the trial court's supplementation of the record to be in error and disregard the supplementation of the record" the record as originally transmitted was sufficient to show no error.

[10] We believe the issue before us is simple and none of the cases cited by either appellants or the state is controlling. We hold that once the appellate record is approved and filed in the appellate court and a motion to supplement that record is then made in the appellate court and the court denies the motion, the trial court does not thereafter have the authority to order the record supplemented. We believe the orderly administration of justice commands this rule. Accordingly, we grant the "State's

Motion to Declare Void appellants' Supplementation of the Records" and order the supplemental transcript filed in this court on July 8, 1983 stricken and returned to the Office of the Harris County District Clerk. The record before this court does not contain a motion to quash. Nothing is presented for this court to review. Appellants' fifteenth point of error is overruled.

[11, 12] In ground of error sixteen, error is asserted in the trial court's overruling of appellants' motion to suppress a video-taped interview of appellant Terry in which no *Miranda* warnings were given. *Miranda* warnings are required only in the context of a custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966). The determinative issue in this case is whether appellant Terry was in custody at the time his interview with assistant district attorney Turbeville was video-taped.

Appellant Terry agreed to meet and discuss with Turbeville complaints received by the district attorney's office concerning Terry's home improvement business. Terry chose the time of the interview: approximately 11:30 a.m., August 27, 1981. The interview was held in a conference room at the District Attorney's Office Building. When Terry elected to terminate the interview, stating "it's attorney time," he left freely without harassment.

[13] A person is deemed to be in custody when a reasonable person under the same circumstances would believe himself not free to leave or break off police interrogation. *Stone v. State,* 583 S.W.2d 410 (Tex. Crim. App. 1979). As the facts indicate, appellant Terry was not in custody when his interview with assistant district

attorney Turbeville was video-taped, thus no *Miranda* warnings were required. Ground of error sixteen is overruled.

We note that while the verdict of the jury is correctly recited in each judgment against each appellant assessing, in addition to confinement, "a fine of $2,500," the judgment itself recites "the court assessed a fine of $5,000." Each of the judgments against each appellant is reformed to correctly reflect that on each count of the indictment punishment was assessed at confinement in the Texas Department of Corrections for five years and in addition thereto a fine of $2,500.

As reformed, the judgments are affirmed.

APPENDIX D

APPENDIX D-1

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D-2

CODE OF CRIMINAL PROCEDURE

[1979]

Art. 40.09. The record on appeal

1. Record in appeals to the Court of Criminal Appeals

In all cases appealable by law to the Court of Criminal Appeals, the clerk of the court that entered the conviction sought to be appealed from shall, under his hand and seal of the court, make and prepare an appellate record comprising a true copy of the matter designated by the parties, but shall always include, whether designated or not, copies of the material pleadings, material docket entries made by the court, the charge, verdict, judgment, sentence, notice of appeal, any appeal bond, all written motions and pleas and orders of the court, and bills of exception. The matter so prepared shall be assembled under one cover and shall constitute the record on appeal. The pages of this record shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the record. The record shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

2. Designation of material for inclusion in the record

Each party may file with the clerk a written designation specifying matter for inclusion in the record. The failure of the clerk to include designated matter will not be ground for complaint on appeal if the designation specifying such matter be not filed with the clerk within sixty days after notice of appeal is given.

3. Statement of facts and other proceedings

The record may include a transcription of all or any part of the proceedings shown by notes of the reporter to have occurred before, during or after the trial and the same will constitute the statement of facts for the appeal. A transcription applicable to any proceeding occurring before or within a period of ninety days after notice of appeal shall be filed with the clerk for inclusion in the record not later than the end of such period. A transcription of notes applicable to any proceeding occuring after the end of such period shall be filed with the clerk for inclusion in the record not later than thirty days after the end of such proceeding.

4. Effect of transcription of reporter's notes

At the request of either party the court reporter shall take shorthand notes of all trial proceedings, including voir dire examination, objections to the court's charge, and final arguments. He is not entitled to any fee in addition to his salary for taking these notes. A transcription of the reporter's notes when certified to by him and included in the record shall establish the occurrence and existence of all testmiony, argument, motions, pleas, objections, exceptions, court actions, refusals of the court to act and other events thereby shown and no further proof of the occurrence or existence of same shall be necessary on appeal; provided, however, that the court shall have power, after hearing, to enter and make part of the record any finding or adjudication which the court may deem essential to make any such transcription speak the truth in any particular in which the court finds it does not speak the truth and any such finding or adjudication having support in the evidence shall be final.

5. Responsibility for obtaining transcription of reporter's notes

A party desiring to have included in the record a transcription of notes of the reporter shall have the responsibility of obtaining such transcription and furnishing same to the clerk in duplicate in time for inclusion in the record and the defendant shall pay therefor. The court will order the reporter to make such transcription without charge to defendant if the court finds, after hearing in response to affidavit by defendant that he is unable to pay or give security therefor. Upon certificate of the court that this service has been rendered, payment therefor shall be made from the general funds by the county in which the offense is alleged to have been committed in a sum to be set by the trial judge. The court reporter shall report any portion of the proceedings requested by either party or directed by the court.

6. Bills of exception

(a) A party desiring to have the record disclose some action, testimony, evidence, proceeding, objection, exception or other event or occurrence not otherwise shown by the record may utilize a bill of exception for this purpose. Bills of exception must be filed with the clerk and presented to the trial judge within ninety days after notice of appeal is given. The clerk shall notify the court of each bill immediately upon its being filed. The court shall either approve the bill without qualification or shall approve it subject to qualification or refuse it, setting forth in the qualification or refusal any reasons that may seem proper to the judge. Notice of the court's action in qualifying or refusing a bill shall be immediately given by the clerk to the party filing the bill or to his counsel,

and such party, if unwilling to accept the court's qualification or refusal may not later than fifteen days after receipt of such notice, file a bystander's bill of exception, and the clerk shall include same in the record. A bill of exception will be deemed approved without qualification if it be not acted upon by the trial judge within a period of 100 days after notice of appeal is given and no extension of time for filing has been granted; provided, however, if an extension of time for filing has been granted, a bill of exception will be deemed approved without qualification if it be not acted upon by the trial judge within a period of 10 days after the actual filing of the bill.

(b) A bill of exception shall be a necessary predicate for appellate review only if the matter complained of is not otherwise shown by the record as herein provided. Errors otherwise shown by the record may be reviewed on appeal without the necessity of any bill of exception. If the date of filing with the clerk of any document in the record is shown by notation of the clerk thereon, no further proof of such date or of the fact of the filing of the document with the clerk shall be necessary. If the transcription of the reporter's notes or any court order or docket entry by the court shows the occurrence or existence of any particular action by the court or refusal of the court to act or any objection or exception or any other event, no further proof of the occurrence or existence of same shall be necessary.

(c) Formal exceptions to rulings on evidence, opinions or other actions of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling, opinion or action of the court is made or sought, makes known to the court the action which he desires

the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to the ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

(d)(1) When the court refuses to admit offered testimony or other evidence, the party offering same shall as soon as practicable but before the court's charge is read to the jury be allowed, out of the presence of the jury, to adduce the excluded testimony or other evidence before the reporter, and a transcription of his notes showing such testimony or other evidence and any objections and exceptions of the party offering same shall, when certified to by the reporter and included in the record, establish the nature of such testimony or other evidence, and the objections and exceptions made in connection with the court's exclusion of such testimony or other evidence and no bills of exception shall be essential to authorize appellate review of the question whether the court erred in excluding such testimony or other evidence. The court, in its discretion, may allow an offer of proof in the form of a concise statement by the party offering the same of what the excluded evidence would show, to be made before the reporter out of the presence of the jury as an alternative method of causing the record to show such excluded testimony or other evidence, and in the event the record contains transcription of the reporter's notes showing such an offer of proof the same shall be accepted on appeal as establishing what such excluded testimony or other evidence would have consisted of had it been admitted into evidence.

(2) When testimony or other evidence has been excluded by the court over objection of the party offering

same, no further offer of the same need be made to preserve the claimed error.

(3) When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence shall be admitted, then in that event such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of such objections being renewed in the presence of the jury.

7. Approval of the record

Notice of completion of the record shall be made by the clerk by certified mail to the parties or their respective counsel. If neither files and presents to the court in writing any objection to the record, within fifteen days after the mailing of such notice and if the court has no objection to the record, he shall approve the same. If such objection be made, or if the court fails to approve the record within five days after the expiration of such fifteen-day period, the court shall set the matter down for hearing, and, after hearing, shall enter such orders as may be appropriate to cause the record to speak the truth and the findings and adjudications in such orders, if supported by evidence, shall be final. In its discretion, the court may require the attendance of the defendant at such hearing. Such proceeding shall be included in the record, and the entire record approved by the court.

8. Filing approved record with clerk

The record, on approval by the court, shall be filed with the clerk of the trial court.

9. Defendant's brief

Within thirty days after approval of the record by the court, the defendant shall file with the clerk of the trial court his appellate brief and sufficient copies of said brief so that each Judge and Commissioner of the Court of Criminal Appeals individually will be provided with a copy of the brief. This brief shall set forth separately each ground of error of which the defendant desires to complain on appeal and may set forth such arguments as he deems appropriate. Each ground of error shall briefly refer to that part of the ruling of the trial court, charge given to the jury, or charge refused, admission or rejection of evidence or other proceedings which are designated to be complained of in such way so that the point of objection can be clearly identified and understood by the court. If the defendant includes in his brief arguments supporting a particular ground of error, they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of arguments made in support thereof in the brief, can identify and understand such point of objection, the same shall be reviewed notwithstanding any generality, vagueness or any other technical defect that may exist in the language employed to set forth such ground of error.

10. The State's brief

Within thirty days after defendant files his brief with the clerk of the trial court, the State shall file with the clerk of the trial court its brief and sufficient copies of said brief so that each Judge and Commissioner of the Court of Criminal Appeals individually will be provided

with a copy of the brief. Each party, upon filing his brief with the clerk of the trial court, shall cause a true copy thereof to be delivered to the opposing party or to the latter's counsel.

11. Oral arguments

The trial court may require oral arguments on the briefs and, if so, shall cause the clerk to notify counsel for both sides of the time and place for such arguments.

12. Trial court's duty

It shall be the duty of the trial court to decide from the briefs and oral arguments, if any, whether the defendant should be granted a new trial by the trial court. This duty shall be performed within the period of thirty days immediately after the state's brief is filed, or, if none be filed, then within the period of thirty days immediately after the last day on which the state's brief could be timely filed. Omission of the court to perform this duty within such period shall constitute refusal of the court to grant a new trial to defendant.

13. Transmission of record to Court of Criminal Appeals

Upon refusal of the court to grant defendant a new trial, the clerk shall thereupon promptly transmit the record and briefs to the Court of Criminal Appeals, in which court all grounds of error and arguments in support thereof urged in defendant's brief in the trial court shall be reviewed, as well as any unassigned error which in the opinion of the Court of Criminal Appeals should be reviewed in the interest of justice.

14. Agreed statement

The parties may agree, with the approval of the trial court, upon a brief statement of the case and of the facts proven as will enable the appellate court to determine whether there is error in the trial. Such statement shall be copied into the record in lieu of the procedings themselves.

15. Order as to original papers or exhibits

Whenever the trial court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation and return thereof as it deems proper. The appellate court on its own initiative may direct the clerk of the trial court to send to it any original paper or exhibit for its inspection.

16. Extensions of time

Extensions of time for meeting the limits prescribed in Sections 3, 6, 9, and 10 of this Article for either the appellant or the State may be granted by the Court of Criminal Appeals or a judge of the Court for good cause shown on timely application to the Court of Criminal Appeals.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1742, ch. 659, § 27, eff. Aug. 28, 1967; Acts 1973, 63rd Leg., p. 1261, ch. 460, § 2, eff. Aug. 27, 1973; Acts 1977, 65th Leg., p. 638, ch. 236, §§ 1 to 3, eff. May 25, 1977.

APPENDIX D-3

CODE OF CRIMINAL PROCEDURE

[1986]

Art. 40.99. The record on appeal

1. Record on appeals

In all cases appealable by law to the courts of appeals or the Court of Criminal Appeals, the clerk of the court that entered the judgment of conviction or order revoking probation sought to be appealed from shall, under his hand and seal of the court, make and prepare an appellate record comprising a true copy of the matter designated by the parties, but shall always include, whether designated or not, copies of the material pleadings, material docket entries made by the court, the court's charges, the jury's verdicts, the judgment or any order revoking probation, the motion or amended motion for new trial, the notice of appeal, any appeal bond, copies of all exhibits on file, other than physical exhibits or documents of unusually large bulk or weight, and all formal bills of exception. The matter so prepared shall be assembled and shall constitute the record on appeal. The pages of this record shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the record. The record shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

2. Designation of material for inclusion in the record

Each party may file with the clerk a written designation specifying matter for inclusion in the record. The

appellant shall file his designation within 20 days after giving of notice of appeal. The state shall file its designation within 30 days after the giving of notice of appeal. The failure of the clerk to include designated matter will not be ground for complaint on appeal if the designation specifying such matter is not timely filed. Each party shall serve a copy of its designation on the opposing party.

3. Statement of facts and other proceedings

The record may include a transcription of all or any part of the proceedings shown by notes of the reporter to have occurred before, during or after the trial and the same will constitute the statement of facts for the appeal. A transcription applicable to any proceeding occurring before notice of appeal shall be filed with the clerk for inclusion in the record not later than 60 days after notice of appeal. A transcription of the notes applicable to any proceeding occurring after notice of appeal shall be filed with the clerk for inclusion in the record not later than thirty days after the end of such proceeding.

4. Effect of the transcription of the court reporter's notes

At the request of either party the court reporter shall take shorthand notes of all trial proceedings, including voir dire examination, objections to the court's charge, and final arguments. He is not entitled to any fee in addition to his salary for taking these notes. A transcription of the reporter's notes when certified to by him and included in the record shall establish the occurrence and existence of all testimony, argument, motions, pleas, objections, exceptions, court actions, refusals of the court to act and other events thereby shown and no further

proof of the occurrence or existence of same shall be necessary on appeal; provided, however, that the court shall have power, after hearing, to enter and make part of the record any finding or adjudication which the court may deem essential to make any such transcription speak the truth in any particular in which the court finds it does not speak the truth and any such finding or adjudication having support in the evidence shall be final.

5. Responsibility for obtaining a transcription of the reporter's notes

If a party desires to have all or any portion of a transcription of the court reporter's notes included in the record, he shall so designate with the clerk in writing and within the time required by Section 2 of this Article. Such party shall then have the responsibility of obtaining such transcription from the court reporter and furnishing the same to the clerk in duplicate in time for inclusion in the record and the appellant shall pay therefor. The court will order the reporter to make such transcription without charge to appellant if the court finds, after hearing in response to an affidavit filed by the appellant not more than 20 days after giving notice of appeal that he is unable to pay or give security therefor. Upon certificate of the court that this service has been rendered, payment therefor shall be made from the general funds by the county in which the offense is alleged to have been committed in a sum to be set by the trial judge. The court reporter shall report any portion of the proceedings requested by either party or directed by the court.

6. Formal bills of exception

(a) A party desiring to have the record disclose some action, testimony, evidence, proceeding, objection, excep-

tion or other event or occurrence not otherwise shown by the record may utilize a bill of exception for this purpose. Bills of exception must be filed with the clerk within 75 days after notice of appeal is given. The clerk shall notify the court of each bill immediately upon its being filed and shall immediately send a copy of the bill to opposing counsel. Opposing counsel shall then have 10 days after the filing of the bill in which to make his objections to the same. The bill shall then be presented to the court not less than 10 days nor more than 20 days after the filing of the bill. Upon presentation, the court shall either approve the bill without qualification or shall approve it subject to qualification or refuse it, setting forth in the qualification or refusal any reasons that may seem proper to the judge. Notice of the court's action in qualifying or refusing a bill shall be immediately given by the clerk to the party filing the bill or to his counsel and the opposing counsel, and the party filing the bill, if unwilling to accept the court's qualification or refusal may not later than 15 days after receipt of such notice, file a bystander's bill of exception, and the clerk shall include same in the record. A bill of exception will be deemed approved without qualification if it be not acted upon by the trial judge within a period of 100 days after notice of appeal is given and no extension of time for filing has been granted; provided, however, if any extension of time for filing has been granted, a bill of exception will be deemed approved without qualification if it be not acted upon by the trial judge within a period of 25 days after the actual filing of the bill.

(b) A bill of exception shall be a necessary predicate for appellate review only if the matter complained of is not otherwise shown by the record as herein provided.

Errors otherwise shown by the record may be reviewed on appeal without the necessity of any bill of exception. If the date of filing with the clerk of any document in the record is shown by notation of the clerk thereon, no further proof of such date or of the fact of the filing of the document with the clerk shall be necessary. If the transcription of the reporter's notes or any court order or docket entry by the court shows the occurrence or existence of any particular action by the court or refusal of the court to act or any objection or exception or any other event, no further proof of the occurrence or existence of same shall be necessary.

(c) Formal exceptions to rulings on evidence, opinions or other actions of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party, at the time the ruling, opinion or action of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to the ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.

(d)(1) When the court refuses to admit offered testimony or other evidence, the party offering same shall as soon as practicable but before the court's charge is read to the jury be allowed, out of the presence of the jury, to adduce the excluded testimony or other evidence before the reporter, and a transcription of his notes showing such testimony or other evidence and any objections and exceptions of the party offering same shall, when certified to by the reporter and included in the record, establish the nature of such testimony or other evidence, and

the objections and exceptions made in connection with the court's exclusion of such testimony or other evidence and no bills of exception shall be essential to authorize appellate review of the question whether the court erred in excluding such testimony or other evidence. The court, in its discretion, may allow an offer of proof in the form of a concise statement by the party offering the same of what the excluded evidence would show, to be made before the reporter out of the presence of the jury as an alternative method of causing the record to show such excluded testimony or other evidence, and in the event the record contains transcription of the reporter's notes showing such an offer of proof the same shall be accepted on appeal as establishing what such excluded testimony or other evidence would have consisted of had it been admitted into evidence.

(2) When testimony or other evidence has been excluded by the court over objection of the party offering same, no further offer of the same need be made to preserve the claimed error.

(3) When the court hears objections to offered evidence out of the presence of the jury and rules that such evidence shall be admitted, then in that event such objections shall be deemed to apply to such evidence when it is admitted before the jury without the necessity of such objections being renewed in the presence of the jury.

7. Approval of the record

Notice of completion of the record shall be made by the clerk by certified or registered mail to the parties or their respective counsel. If neither files and presents to the court in writing any objection to the record, within

15 days after the mailing of such notice and if the court has no objection to the record, he shall approve the same. If the trial court deems that a supplemental record or any other modification of the record be necessary to make the record speak the truth, for any reason, with or without objections from the state or the defendant, and whether on the court's own motion or the motion of either party or by order of the court of appeals or the Court of Criminal Appeals, the defendant and the state shall be notified by certified or registered mail of same and be given five days from receipt of notice for objections to such modification or supplementation. If objection be made, or if the court fails to approve the record within five days after the expiration of such 15-day period, the court shall set the matter down for hearing, and, after hearing, shall enter such orders as may be appropriate to cause the record to speak the truth and the findings and adjudications in such orders, if supported by evidence, shall be final. In its discretion, the court may require the attendance of the defendant at such hearing. Such proceeding shall be included in the record, and the entire record approved by the court.

8. Filing approved record with clerk

The record, on approval by the court, shall be filed with the clerk of the trial court, who shall immediately transmit it to the appropriate appellate court. Notice of the approval of the record by the court shall be made by the clerk by registered or certified mail to the parties or their respective counsel. The 30-day time limit provided in Section 9 of this article shall commence when the notice is mailed.

9. Appellant's brief

Within 30 days after approval of the record by the court, the appellant shall file with the clerk of the appellate court the original and three copies of his appellate brief, or the number of copies required by the rules of the court of criminal appeals. The rules may not require him to file more than 10 copies. This brief shall set forth separately each ground of error of which the appellant desires to complain on appeal and may set forth such arguments as he deems appropriate. Each ground of error shall briefly refer to that part of the ruling of the trial court, charge given to the jury, or charge refused, admission or rejection of evidence, or other proceedings which are designated to be complained of in such way so that the point of objection can be clearly identified and understood by the court. If the appellant includes in his brief arguments supporting a particular ground of error, they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of arguments made in support thereof in the brief, can identify and understand such point of objection, the same shall be reviewed notwithstanding any generality, vagueness, or any other technical defect that may exist in the language employed to set forth such ground of error.

10. The State's brief

Within 30 days after appellant files his brief with the clerk of the appellate court, the state shall file with the clerk of the appellate court the original and three copies of its brief, or the number of copies required by the rules of the court of criminal appeals. The rules may not re-

quire the state to file more than 10 copies. Each party, upon filing his brief with the clerk of the appellate court, shall cause a true copy thereof to be delivered to the opposing party or to the latter's counsel.

11. Agreed statement

The parties may agree, with the approval of the trial court, upon a brief statement of the case and of the facts proven as will enable the appellate court to determine whether there is error in the trial. Such statement shall be copied into the record in lieu of the proceedings themselves.

12. Order as to original papers or exhibits

Whenever the trial court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation and return thereof as it deems proper. The appellate court on its own initiative may direct the clerk of the trial court to send to it any original paper or exhibit for its inspection.

13. Extensions of time

Text of subd. 13 as amended by Acts 1981, 67th Leg., p. 804, ch. 291, § 108

Extensions of time for meeting the limits prescribed in Sections 3, 6, 7, 9, and 10 of this Article for either the appellant or the state may be granted by the appellate court in which the case will be filed or a judge thereof for good cause shown on timely application to the appellate court.

13. Extensions of time

Text of subd. 13 (former subd. 16) as amended by Acts 1981, 67th Leg., p. 361, ch. 144, § 1

Extensions of time for meeting the limits prescribed in Sections 3, 6, 9, and 10 of this Article for either the appellant or the State may be granted by the trial court for good cause shown on timely application to the trial court.

Subd. 7 amended by Acts 1979, 66th Leg., p. 731, ch. 324, § 1, eff. Aug. 27, 1979; Subd. 8 amended by Acts 1979, 66th Leg., p. 447, ch. 204, § 1, eff. Aug. 27, 1979; Subds. 9, 10 amended by Acts 1979, 66th Leg., p. 865, ch. 390, § 1, eff. Sept. 1, 1979; Subd. 16 amended by Acts 1981, 67th Leg., p. 361, ch. 144, § 1, eff. May 14, 1981. Amended by Acts 1981, 67th Leg., p. 804, ch. 291, § 108, eff. Sept. 1, 1981. Subd. 1 amended by Acts 1983, 68th Leg., p. 1730, ch. 329, § 1, eff. Aug. 29, 1983.

APPENDIX D-4

CODE OF CRIMINAL PROCEDURE

Art. 44.02. [813] [894] [872] Defendant may appeal

A defendant in any criminal action has the right of appeal under the rules hereinafter prescribed, provided, however, before the defendant who has been convicted upon either his plea of guilty or plea of nolo contendere before the court and the court, upon the election of the defendant, assesses punishment and the punishment does not exced the punishment recommended by the prosecutor and agreed to by the defendant and his attorney may prosecute his appeal, he must have permission of the trial court, except on those matters which have been raised by written motion filed prior to trial. This article in no way affects appeals pursuant to Article 44.17 of this chapter.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1977, 65th Leg., p. 940, ch. 351, § 1, eff. Aug. 29, 1977.

Art. 44.02. [813] [894] [872] Defendant may appeal

Partial Repeal by Texas Rules of Appellate Procedure

By order of the Texas Court of Criminal Appeals dated December 18, 1985, effective September 1, 1986, adopting the Texas Rules of Appellate Procedure, pursuant to Acts 1985, 69th Leg., ch. 685, § 4, the court repealed the proviso only of this article.

APPENDIX D-5

RULES OF APPELLATE PROCEDURE

SECTION FOUR. APPEALS FROM JUDGMENTS AND ORDERS OF TRIAL COURTS

Rule 40. Ordinary Appeal—How Perfected

(a) Appeals in Civil Cases.

(1) *When Security is Required.* When security for costs is required by law, the appeal is perfected when the bond, cash deposit or affidavit in lieu thereof has been filed or made, or if affidavit is contested, when the contest is overruled. The writ of error is perfected when the petition and bond or cash deposit is filed or made (when bond is required), or affidavit in lieu thereof is filed, or, if contested, when the contest is overruled.

(2) *When Security is Not Required.* When security for costs on appeal is not required by law, the appellant shall in lieu of a bond file a written notice of appeal with the clerk or judge which shall be filed within the time otherwise required for filing the bond. Oral notice or a recital in the judgment of notice does not comply with this rule. Such notice shall be sufficient if it states the number and style of the case, the court in which pending, and that appellant desires to appeal from the judgment or some designated portion thereof. Copy of the notice shall be mailed by counsel for appellant in the same manner as the mailing of copies of the appeal bond.

(3) *When Party is Unable to Give Security.*

(A) When the appellant is unable to pay the cost of appeal or give security therefor, he shall be entitled to prosecute an appeal or writ of error by filing with the clerk, within the period prescribed by Rule 41, his affidavit stating that he is unable to pay the costs of appeal or any part thereof, or to give security therefor.

(B) The appellant or his attorney shall give notice of the filing of the affidavit to the opposing party or his attorney and to the court reporter of the court where the case was tried within two days after the filing; otherwise, he shall not be entitled to prosecute the appeal without paying the costs or giving security therefor.

(C) Any interested officer of the court or party to the suit, may file a contest to the affidavit within ten days after notice thereof, whereupon the court trying the case (if in session) or (if not in session) the judge of the court or county judge of the county in which the case is pending shall set the contest for hearing, and the clerk shall give the parties notice of such setting.

(D) The burden of proof at the hearing of the contest shall rest upon the appellant to sustain the allegations of the affidavit.

(E) If no contest is filed in the allotted time, the allegations of the affidavit shall be taken as true. If a contest is filed, the court shall hear the same within ten days after its filing unless

the court extends the time for hearing and determining the contest by a signed written order made within the ten day period. The court shall not extend the time for more than twenty additional days after the date of the order of extension. If no ruling is made on the contest within the ten day period or within the period of time as extended by the court, the allegations of the affidavit shall be taken as true.

(F) If the appellant is able to pay or give security for a part of the costs of appeal, he shall be required to make such payment or give such security (one or both) to the extent of his ability.

(4) *Notice of Limitation of Appeal.* No attempt to limit the scope of appeal shall be effective as to a party adverse to the appellant unless the severable portion of the judgment from which the appeal is taken is designated in a notice served on the adverse party within fifteen days after judgment is signed, or if a motion for new trial is filed by any party, within seventy-five days after the judgment is signed.

(5) *Judgment Not Suspended by Appeal.* Except as provided in Rule 43, the filing of a bond or the making of a deposit or a affidavit does not have the effect of suspending the judgment. Unless a supersedeas bond or deposit is made as provided in Rule 47, execution may issue thereon as if no appeal or writ of error had been taken.

(b) Appeals in Criminal Cases.

(1) Appeal is perfected in a criminal case by giving timely notice of appeal; except, it is unnecessary to give notice of appeal in death penalty cases. Notice of appeal shall be given in writing filed with the clerk of the trial court. Such notice shall be sufficient if it shows the desire of the defendant to appeal from the judgment or other appealable order; but if the judgment was rendered upon his plea of guilty or nolo contendere pursuant to Article 1.15, Code of Criminal Procedure, and the punishment assessed does not exceed the punishment recommended by the prosecutor and agreed to by the defendant and his attorney, in order to prosecute an appeal for a nonjurisdictional defect or error that occurred prior to entry of the plea the notice shall state that the trial court granted permission to appeal or shall specify that those matters were raised by written motion and ruled on before trial. The clerk of the trial court shall note on copies of the notice of appeal the number of the cause and the day that notice was filed, and shall immediately send one copy to the clerk of the appropriate court of appeals and one copy to the attorney for the State.

(2) *Effect of Appeal in Criminal Cases.* In the appeal of a criminal case when the record has been filed in the appellate court all further proceedings in the trial court, except as provided by law or by these rules, shall be suspended and arrested until the mandate of the appellate court is received by the trial court.

Rule 51. The Transcript on Appeal

(a) Contents. Unless otherwise designated by the parties in accordance with Rule 50, the transcript on appeal shall include copies of the following: in civil cases, the live pleadings upon which the trial was held; in criminal cases, copies of the indictment or information, any special pleas and motions of the defendant which were presented to the court and overruled, and any written waivers; the court's docket sheet; the charge of the court and the verdict of the jury, or the court's findings of fact and conclusions of law; the court's judgment or other order appealed from; any motions for new trial and the order of the court thereon; any notice of appeal; any appeal bond, affidavit in lieu of bond or clerk's certificate of a deposit in lieu of bond; any notice of limitation of appeal in civil cases made pursuant to Rule 40; any formal bills of exception provided for in Rule 52; in civil cases, a certified bill of costs, including the cost of the transcript and the statement of facts (if any), showing any credits for payments made; and, subject to the provisions of paragraph (b) of this rule, any filed paper any party may designate as material.

(b) Written Designation. At or before the time prescribed for perfecting the appeal, any party may file with the clerk a written designation specifying matter for inclusion in the transcript; the designation must be specific and the clerk shall disregard any general designation such as one for "all papers filed in the cause." The failure of the clerk to include designated matter will not be grounds for complaint on appeal if the designation specifying such matter is not timely filed. The party

making the designation shall serve a copy of the designation on all other parties.

(c) Duty of Clerk. Upon perfection of the appeal, the clerk of the trial court shall prepare under his hand and seal of the court and immediately transmit the transcript to the appellate court designated by the appellant. The pages of the transcript shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the transcript. The transcript shall be prepared in the form directed by the Supreme Court and the Court of Criminal Appeals which will make an order or orders in such respect for the guidance of trial clerks. In criminal cases, the transcript shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

(d) Original Exhibits. When the trial court is of the opinion that original papers or exhibits should be inspected by the appellate court or sent to the appellate court in lieu of copies, it may make such order therefor and for the safekeeping, transportation, and return thereof as it deems proper. The order shall contain a list of such original exhibits in numerical order, with a brief identifying description of each, and, so far as practicable, all such exhibits shall be arranged in the order listed and firmly bound together. The appellate court on its own initiative may direct the clerk of the court below to send to it any original paper or exhibit for its inspection.

Rule 53. The Statement of Facts on Appeal

(a) Appellant's Request. In order to present a statement of facts on appeal, the appellant, at or before the time prescribed for perfecting the appeal, shall make a written request to the official reporter designating the portion of the evidence and other proceedings to be included therein. A copy of such request shall be filed with the clerk of the trial court and another copy served on the appellee.

(b) Other Requests. Within ten days after service of a copy of appellant's request, any party may in the same manner request additional portions of the evidence and other proceedings to be included.

(c) Abbreviation of Statement. All matters not essential to the decision of the questions presented on appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document appearing in the statement of facts shall be excluded. All documents shall be abridged by omitting all irrelevant and formal portions thereof.

(d) Partial Statement. If appellant requests or prepares a partial statement of facts, he shall include in his request or proposal a statement of the points to be relied on and shall thereafter be limited to such points. If such statement is filed, there shall be a presumption on appeal that nothing omitted from the record is relevant to any of the points specified or to the disposition of the appeal. Any other party may designate additional portions of the evidence to be included in the statement of facts.

(e) Unnecessary Portions. In civil cases if either party requires more of the testimony or other proceedings than

is necessary, he shall be required by the appellate court to pay the costs thereof, regardless of the outcome of the appeal.

(f) Certification by Court Reporter. The statement of facts shall be in sufficient form to be filed in the appellate court when it is certified by the official court reporter.

(g) Reporter's Fees. The official court reporter shall include in his certification the amount of his charges for preparation of the statement of facts. The Supreme Court and the Court of Criminal Appeals may from time to time make an order providing the fees which court reporters may charge.

(h) Form. The Supreme Court and the Court of Criminal Appeals will make an order or orders directing the form of the statement of facts and the court reporter will prepare the same in conformity therewith.

(i) Narrative Statement. A statement of facts prepared by the official reporter shall be in question and answer form. In lieu of requesting such a statement of facts, a party may prepare and file with the clerk of the trial court a condensed statement in narrative form of all or part of the testimony and deliver a true copy of the opposing party or his counsel, and such opposing party, if dissatisfied with the narrative statement, may within ten days after such delivery, require the testimony in question and answer form to be substituted for all or part thereof.

(j) Free Statement of Facts.

(1) *Civil Cases.* In any case where the appellant has filed the affidavit required by Rule 40 to appeal his case without bond, and no contest is filed, or any contest is overruled, the court or judge upon appli-

cation of appellant shall order the official reporter to prepare a statement of facts, and to deliver it to appellant, but the court reporter shall receive no pay for same.

(2) *Criminal Cases.* Within the time prescribed for perfecting the appeal an appellant unable to pay for the statement of facts may, by motion and affidavit, move the trial court to have the statement of facts furnished without charge. After hearing the motion, if the court finds the appellant is unable to pay for or give security for the statement of facts, the court shall order the reporter to furnish the statement of facts, and when the court certifies that the statement of facts has been furnished to the appellant, the court reporter shall be paid from the general funds of the county, by the county in which the offense was committed the sum set by the trial judge.

(k) Duty of Appellant to File. It is the appellant's duty to cause the statement of facts to be filed with the Clerk of the Court of Appeals.

(*l*) Duplicate Statement in Criminal Cases. In criminal cases, if any party desires a statemnt of facts included in the record, a duplicate of the statement of facts shall be prepared by the court reporter and filed with the clerk of the court.

(m) When No Statement of Facts Filed in Appeals of Criminal Cases. If the clerk of the appellate court does not receive a statement of facts when due, he shall notify the trial judge and the appellant's attorney, if the appellant's attorney can be determined from the transcript, that a statement of facts has not been filed and that in the absence of a statement of facts the appeal will be sub-

mitted on the transcript alone. If no statement of facts has been filed, the appellate court may order the trial court to hold a hearing to determine whether the appellant has been deprived of a statement of facts because of ineffective counsel or for any other reason, to make findings of fact and conclusions of law, to appoint counsel if necessary, and to transmit to the appellate court the record of the hearing. The appellate court may order a late filing of statement of facts.

Rule 55. Amendment of the Record

(a) Inaccuracies on the Statement of Facts. Any inaccuracies may be corrected by agreement of the parties; should any dispute arise, after filing in the appellate court as to whether the statement of facts accurately discloses what occurred in the trial court, the appellate court shall submit the matter to the trial court, which shall, after notice to the parties and hearing, settle the dispute and make the statement of facts conform to what occurred in the trial court.

(b) Before Submission. If anything material to either party is omitted from the transcript or statement of facts, before submission the parties by stipulation, or the trial court, upon notice and hearing, either before or after the record has been transmitted to the appellate court, or the appellate court, on a proper suggestion or on its own initiative, may direct a supplemental record to be certified and transmitted by the clerk of the trial court or the official court reporter supplying such omitted matter. The appellate court shall permit it to be filed unless the supplementation will unreasonably delay disposition of the appeal.

(c) Defects Appearing At or After Submission. Should it be apparent during the submission or afterwards that the case has not been properly prepared as shown in the transcript, or properly presented in the brief or briefs, or that the law and authorities have not been properly cited, which will enable the court to decide the case, it may decline to receive the submission; or, if received, may set it aside and make such orders as may be necessary to secure a more satisfactory submission of the case; or should it appear to the court, after the submission of the cause, that the statement of facts has been prepared in violation of the rules, the court may require the appellant to furnish a proper statement of facts, and upon his failure to do so may disregard it.

Rule 56. Receipt of the Record by Court of Appeals

(a) Duty of Clerk on Receiving Transcript. The clerks of the courts of appeals shall receive the transcripts delivered and sent to them, and receipt for same if required; but they shall not be required to take a transcript out of the post office or any express office, unless the postage or charges thereon be fully paid. Upon receipt of the transcript, it shall be the duty of the clerk to examine it in order to ascertain whether or not, in case of an appeal, a proper appeal bond, notice of appeal or affidavit in lieu thereof (when bond is required) have been given; and in case of a writ of error, whether or not the petition and bond or affidavit in lieu thereof (when bond is required) appear to have been filed. If it seems to him that the appeal or writ of error has not been duly perfected, he shall note on the transcript the day of its reception and refer the matter to the court. If upon such reference the court shall be of the opinion that the

transcript shows that the appeal or writ of error has been duly perfected, they shall order the transcript to be filed as of the date of its reception. If not, they shall cause notice of the defect to issue to the attorneys of record of the appellant, to the end that they may take steps to amend the record, if it can be done; for which a reasonable time shall be allowed. If the transcript does not show the jurisdiction of the court, and if after notice it be not amended, the appeal shall be dismissed.

If a transcript, properly endorsed (when endorsement is required), is received by the clerk within the time allowed by these rules, he shall endorse his filing thereon, showing the date of its reception, and shall notify both appellant and the adverse party of the receipt of the transcript. If it is not properly endorsed, or an original transcript is received after the time allowed, the clerk shall, without filing it, make a memorandum upon it of the date of its reception and keep it in his office subject to the direction of the person who applied for it or to the disposition of the court, and shall notify the person who applied for a transcript why it has not been filed. The transcript shall not be filed until a proper showing has been made to the court for its not being properly endorsed or received in proper time, and upon this being done, the court may order it filed, if the rules have been complied with, upon such terms as may be deemed proper, having respect to the rights of the opposite party.

(b) Duty of Clerk on Receiving Statement of Facts. Upon receipt of a statement of facts, the clerk shall ascertain if it is presented within the time allowed and also if it has been properly authenticated in accordance with these rules. If the clerk finds that the statement of

facts is presented in time and has been certified by the official court reporter, the clerk shall file it forthwith; otherwise, the clerk shall endorse thereon the time of the receipt of such statement of facts, hold the same subject to the order of the court of appeals, and notify the party (or his attorney) tendering the statement of facts of the action and state the reasons therefor.

APPENDIX E

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0156-84

STYLE: Smith, Henry Martin aka Emmons, Don

November 26, 1986

On this day the Appellant's Motion for Rehearing was denied.

COA#: 14-82-00392-CR Thomas Lowe, Clerk

Court of Criminal Appeals
P. O. Box 12308, Capital Station
Austin, Texas 78711

Mail to:

Larry P. Urquhart
207 East Main
Brenham, TX 77833

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

RE: Case No. 0157-84

STYLE: Terry, Dirk Vincent

November 26, 1986

On this day the Appellant's Motion for Rehearing was denied.

COA# 14-82-00397-CR Thomas Lowe, Clerk

Court of Criminal Appeals
P. O. Box 12308, Capital Station
Austin, Texas 78711

Mail to:

Larry P. Urquhart
207 East Main
Brenham, TX 77833

APPENDIX F

APPENDIX F-1

NO. 340286

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
209TH JUDICIAL DISTRICT

HENRY MARTIN SMITH

v.

THE STATE OF TEXAS

MOTION TO SUPPLEMENT THE
APPELLATE RECORD

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now HENRY MARTIN SMITH, the Defendant in the above entitled and numbered cause, and files this Motion to Supplement the Appellate Record and in support thereof shows the Court the following:

I.

The Defendant was convicted in a joint trial with DIRK VINCENT TERRY on four counts of securing execution of a document by deception. Punishment was assessed on each count at five years imprisonment and a $2,500.00 fine. The Defendant gave notice of appeal on all four counts.

II.

This Court has approved the appellate record and the Defendant has filed his appellate brief in the Court of Appeals for the Fourteenth Supreme Judicial District. The State has not yet filed its responding appellate brief. One of the grounds of error raised by the Defendant in his appellate brief is that the Court erred in overruling his Motion to Quash the Indictment. Although the appellate record contains a statement of facts of the hearing on the Defendant's Motion to Quash, the transcript contained in Volume 1 of the record does not contain the Motion to Quash the Indictment on which that hearing was conducted. A copy of said Motion to Quash the Indictment is attached hereto and incorporated herein for all purposes. This motion reflects cause number 341,905, which was a predecessor indictment to the subsequent reindictment in cause number 340286 on which the Defendant was tried and convicted. The parties treated the motion filed in cause number 341,905 as applicable to the subsequent indictment.

III.

In order to present an adequate appellate record to the Court of Appeals for its review in considering the Defendant's ground of error regarding denial of his Moiton to Quash, the Defendant respectfully requests this Court to enter an order directing the Clerk to prepare and issue notice of completion of a supplemental appellate record which contains the Motion to Quash the Indictment filed by the Defendant in Cause Number 341,905. After proper notice to the parties, the Defendant requests this Court to approve the supplemental record and forward it to

the Court of Appeals for its consideration in determining the merit of the Defendant's appeal.

WHEREFORE, PREMISES CONSIDERED, HENRY MARTIN SMITH respectfully moves this Court to prepare, complete, and approve a supplemental appellate record containing the Motion to Quash the Indictment filed in cause number 341,905, a copy of which is attached hereto, and to forward the said supplemental appellate record to the Court of Appeals for the Fourteenth Supreme Judicial District.

Respectfully submitted,

/s/ TERRY G. COLLINS
Terry G. Collins
2225 LaBranch Street
Houston, Texas 77002
(713) 652-5711
State Bar #04619000

/s/ LARRY P. URQUHART
Larry P. Urquhart
207 East Main
P. O. Box 1808
Brenham, Texas 77833
(409) 836-5664
State Bar #20415700

APPENDIX F-2

NO. 345,042

IN THE 209TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

DIRK VINCENT TERRY

v.

THE STATE OF TEXAS

STATE'S OBJECTION TO
SUPPLEMENTING RECORD

TO THE HONORABLE JUDGE OF THE 209TH DISTRICT COURT:

COMES NOW THE STATE OF TEXAS to object to supplementing the appellate record with the appellant's Motion to Quash the Indictment. The appellant filed a Motion to Supplement the record with said Motion to Quash the Indictment which was denied by order of the Fourteenth Court of Appeals on April 7, 1983 (see attached copy of letter to counsel for the appellant notifying him of said denial). The State has at all times opposed the appellant's efforts to supplement the record in this manner since it is in patent violation of Article 40.09(2) and (7), V.A.C.C.P. *See, Hannah v. State,* 624 S.W.2d 750, 754 (Tex. App.—Houston [14th] 1981).

WHEREFORE, PREMISES CONSIDERED, the State prays that this Honorable Court will order the appellate clerk of this court to cease supplementing the record in

contradiction of the order of the Fourteenth Court of Appeals or, in the alternative, set a date for a hearing on the State's Objection to Supplementing the Record.

Respectfully submitted,

/s/ TIMOTHY G. TAFT
Timothy G. Taft
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002
(713) 221-5826
TBC No. 19608400

APPENDIX F-3

NO. 340286

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
209TH JUDICIAL DISTRICT

HENRY MARTIN SMITH

vs.

THE STATE OF TEXAS

ORDER TO SUPPLEMENT THE
APPELLATE RECORD

On this day came on to be considered the Motion of the Defendant in the above styled and numbered cause for supplementation of the appellate record which has heretofore been approved and is presently filed in the Court of Appeals for the Fourteenth Supreme Judicial District. After considering this Motion, the Court finds that the requested supplementation of the appellate record is necessary to cause the record to speak the truth, and it is therefore

ORDERED that the District Clerk shall prepare and issue notice to the parties of completion of a supplemental record in this cause which contains the Motion to Quash the Indictment filed by the Defendant in cause number 341,905, a copy of which is attached to the Defendant's Motion to Supplement the Appellate Record. The Clerk is directed to follow the procedures prescribed in Article

40.09, Section 7, V.A.C.C.P., in accomplishing this supplementation of the appellate record.

SIGNED this 2nd day of June, 1983.

/s/ MICHAEL MCSPADDEN
Hon. Michael McSpadden
Judge Presiding

APPENDIX F-4

NO. 345,042

IN THE 209TH DISTRICT COURT
OF
HARRIS COUNTY, TEXAS

DIRK VINCENT TERRY

vs.

THE STATE OF TEXAS

ORDER RESCINDING APPROVAL OF SUPPLEMENTAL RECORD REQUIRING RETRIEVAL OF SAID RECORD FROM THE APPELLATE COURT

It having been brought to the attention of this Court that a supplemental appellate record in the above cause was approved on June 28, 1983, and subsequently forwarded to the Fourteenth Court of Appeals prior to this Court holding a hearing on the State's Objection to Supplementing the Record as required by Article 40.09(7), V.A.C.C.P., IT IS HEREBY ORDERED THAT said approval is rescinded and the clerk is ORDERED to retrieve the supplemental record from the Fourteenth Court of Appeals in order that a hearing may be held on the State's Objections prior to approval of the record.

SIGNED this the 30th day of September, 1983.

/s/ MICHAEL T. MCSPADDEN
Michael T. McSpadden
JUDGE, 209th District Court
Harris County, Texas

APPENDIX F-5

CAUSE NO. 345,042

IN THE 209TH DISTRICT COURT
OF
HARRIS COUNTY, TEXAS

DIRK VINCENT TERRY

vs.

THE STATE OF TEXAS

ORDER OVERRULING THE STATE'S OBJECTION TO APPROVAL OF THE SUPPLEMENTAL APPELLATE RECORD

On the 20th day of October, 1983, came on to be considered the State's Objection to the Approval of the Supplemental Appellate Record and Motion to Rescind Said Approval in the above entitled and numbered cause. The Defendant, DIRK VINCENT TERRY, appeared in person and by attorney, LARRY P. URQUHART. The State appeared by its attorney, TIM TAFT. All parties announced ready and a hearing was conducted.

After considering the pleadings and argument of counsel, the Court finds that the Defendant is entitled to a supplemental record for his appeal in this cause in the Court of Appeals and that the objection of the State to the supplemental record should be overruled.

It is therefore ORDERED that the State's objection to approval of the supplemental record be denied and

that the appellate record in this cause shall be composed of the original appellate record and the supplemental appellate record previously approved and forwarded to the Court of Appeals.

It is further ORDERED that a prior order of this Court entered on the 30th day of September, 1983, in which this Court rescinded approval of the supplemental record until a hearing on the State's objection could be conducted, is hereby withdrawn and superseded by this order denying the State's objection and finding that the supplemental record was properly approved and forwarded to the Court of Appeals.

It is further ORDERED that the Clerk of this Court shall forward a certified copy of this Order to the Court of Appeals for the Fourteenth Supreme Judicial District, to TIM TAFT in the Harris County District Attorney's Office, and to LARRY URQUHART, P.O. Box 1808, Brenham, Texas 77833.

SIGNED this the 26th day of October, 1983.

/s/ MICHAEL T. MCSPADDEN
Michael T. McSpadden
Judge, 209th District Court
Harris County, Texas

APPENDIX G

NO. 345,042

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 232nd JUDICIAL DISTRICT

THE STATE OF TEXAS

v.

DIRK VINCENT TERRY

MOTION TO QUASH THE INDICTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, DIRK VINCENT TERRY, the Defendant in the above entitled and numbered cause, and files this Motion to Quash the Indictment in said cause. The Defendant will respectfully show this Honorable Court the following, to-wit:

I.

The Defendant stands charged by indictment with five counts of felony theft over the value of Ten Thousand Dollars.

In paragraph 1 of counts 1 through 5 of said indictment the Defendant is charged with felony theft under Section 31.03 of the Texas Penal Code. The indictment does not allege in what manner or in what means the Defendant is charged with having appropriated such property as required by Section 31.01(5)(A) or (B). Further the indictment alleges that property was appropriated without the effective consent of the Complainant, namely, by deception, however, as required under Section

31.01(4)(A) of the Texas Penal Code said indictment does not allege that such effective consent was induced by deception. Therefore, said paragraph of said indictment is fundamentally defective for the failure to describe by what means such property was appropriated and further is fundamentally defective for the failure to allege that the property was so appropriated without the effective consent of the Complainant, namely, induced by deception.

II.

Paragraphs 2 of counts 1 through 5 charges the Defendant with securing execution of a document by deception as provided under Section 32.46 of the Texas Penal Code. Said paragraphs of said indictment fail to allege the type of deception which Defendant is charged with having committed and further said paragraphs of said indictment fail to state what property of the Complainant was affected as required by Section 32.46 of the Texas Penal Code. Therefore, for the failure of each of said items said paragraphs are fundamentally defective.

WHEREFORE, PREMISES CONSIDERED, Defendant, prays that upon final hearing of this Motion that the indictment in the above entitled and numbered cause be quashed and/or set aside.

Respectfully submitted,

/s/ TERRY G. COLLINS
2225 LaBranch
Houston, TX 77002
713/652-5711
State Bar No. 04619000
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion To Quash the Indictment in the above entitled and numbered cause was mailed via United States Certified Mail, Return Receipt Requested to Russell Turbiville, 201 Fannin, Room #200, Houston, Texas 77002 the Assistant District Attorney representing the State of Texas in the foregoing cause, on this the 20th day of November, A.D., 1981.

/s/ TERRY G. COLLINS
Terry G. Collins

ORDER

BE IT REMEMBERED that on this the 7th day of December, A.D., 1981, came on to be heard the Defendant's Motion To Quash the Indictment, and the Court, after considering the same and hearing the arguments of counsel, is of the opinion that said motion should be, and is hereby:

DENIED.

SIGNED AND ENTERED on this the 7th day of December, A.D., 1981.

/s/ Signature Illegible
Judge Presiding

APPENDIX H

* * *

GROUND OF ERROR FIFTEEN

THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S MOTION TO QUASH ALL COUNTS OF THE INDICTMENT FOR FAILURE TO ALLEGE THE CONDUCT OF THE APPELLANT WHICH CONSTITUTED "DECEPTION" AND FOR FAILURE TO DESCRIBE THE "AFFECTED" PROPERTY.

Each count of the indictment alleged that the Appellant, with intent to defraud and harm the complainant named in that count:

> cause[d] by deception the Complainant to sign and execute the document duplicated below which affected the Complainant's property and pecuniary interest. (R. I-30)

At a hearing on pretrial motions, the Appellant presented and argued a motion to quash all counts of the indictment. The motion to quash attacked the theft paragraphs contained in each count for failing to specify the manner in which the Appellant "appropriated" the victim's property. This portion of the motion to quash, which had merit, later became moot when the State abandoned the theft paragraphs in the indictment. However, in addition to attacking the theft allegations, the motion to quash also assailed the sufficiency of the paragraphs alleging the offenses of securing execution of a document by deception. Specifically, the Appellant contended that the allegation "caused by deception" was inadequate to provide him adequate notice of the particular means by

which the State intended to prove that he induced the named victims to sign documents. In addition, the Appellant contended that the failure of the indictment, in each of the securing execution of document by deception paragraphs, to specifically describe the "affected" property also deprived him of adequate information upon which to prepare his defense (R. XIII- 42-61). (The transcription of the court reporter's notes clearly reflects that such a motion to quash was filed and presented to the trial court at a hearing on pretrial motions conducted prior to trial. However, this particular motion to quash does not appear in the transcript compiled in Volume I of the appellate record. Counsel for the Appellant on appeal will file with this Court, soon after the filing of this appellate brief, a motion asking this Court to direct the trial court to provide the Court with the omitted motion to quash the indictment through a supplemental record.)

As to the complaint in the motion to quash regarding the failure of the indictment to specify the type of deception in which the Appellant engaged as to each count of the indictment, this portion of the motion to quash clearly had merit and was improperly overruled. The Court of Criminal Appeals recently has had occasion in several cases to consider motions to quash which assailed the vagueness of the portion of the charging instrument describing the act of the defendant constituting the "heart" of the offense. The Court has consistently held that where the offense can be committed in one of several different ways, a motion to quash demanding that the State specify the particular means it will rely on must be granted. *Kass v. State,* 642 S.W.2d 463, 468-470 (Tex. Crim. App. 1981); *McBrayer v. State,* 642 S.W.2d 504 (Tex. Crim.

App. 1982); *Ferguson v. State,* 622 S.W.2d 846 (Tex. Crim. App. 1981); *Ellis v. State,* 613 S.W.2d 741 (Tex. Crim. App. 1981); *Cruise v. State,* 587 S.W.2d 403 (Tex. Crim. App. 1979); *Haecker v. State,* 571 S.W.2d 920 (Tex. Crim. App. 1978). The common thread in all of these decisions is that where the portion of the indictment describing the defendant's conduct is susceptible to more than one possible meaning, whether it be an almost endless list of possible meanings because the term or phrase alleged in the indictment is not statutorily defined or a limited selection of possible meanings because the term or phrase is statutorialy defined, a motion to quash the indictment will require the State to obtain another indictment which specifies the means by which the State intends to prove that the offense was committed.

In the present case, the indictment in each count alleged that the Appellant "caused by deception" the named victim to execute a document. "Deception" is not defined in the Penal Code for purposes of Chapter 32, in which the fraud offenses are contained, but is defined in Chapter 31 for purposes of that chapter. Section 31.01 (2), V.A.P.C. This definition of deception may offer some guidance in attempting to determine the meaning of the term deception in Section 32.46, V.A.P.C., but is not controlling. Therefore, the term "deception" when used to charge an offense under Section 32.46 is susceptible to an almost endless list of possible meanings. Moreover, it would be impossible for the prosecution to prove this element of the offense without also showing the manner in which it was done. Therefore, the Appellant was entitled, upon presentation of his motion to quash, to have the present indictment quashed and the State forced to reindict the offenses with language apprising

him of the particular means by which the State intended to prove that he engaged in deception to cause execution of the contracts.

The second portion of the Appellant's motion to quash assailed the failure of the paragraphs alleging the offenses to describe the victim's property that was "affected" by execution of the contracts. In light of Article 21.09, V.A.C.C.P., the trial court also erred in overruling this portion of the Appellant's motion to quash. Under this provision of the Code of Criminal Procedure, where property must be alleged in an indictment, if personal property it must be identified by name, kind, number, and ownership. If real property, it must be identified by its general locality in the county and the name of its owner, occupant or claimant. As to the offense of securing execution of documents by deception proscribed in Section 32.46 of the Penal Code, the two critical elements are the exercise of deception and the resulting effect on property. As earlier noted, the trial court reversibly erred by failing to require the State to specify by what means the Appellant used deception. Likewise, as to the critical element of effect on property, the Appellant was prejudiced by the Court's refusal to require the State to identify the property affected by the deception. The Appellant was left to guess whether the property affected was personal property or real property and, if real property, whether it was the property located at the address shown in the Retail Installment Contract or some other real property. Therefore, the trial court's denial of this portion of the Appellant's motion to quash also presents reversible error. *Bonner v. State,* 640 S.W.2d 601 (Tex. Crim. App. 1982).

* * *

APPENDIX J

INDICTMENT

THE STATE OF TEXAS

v.

DIRK VINCENT TERRY WM
4147 PARK DOUGLAS
HOUSTON, TEXAS

DOB: 12-19-57

FELONY CHARGE: THEFT (D. B. P.) Five Counts

CAUSE NO.: 345042

HARRIS COUNTY DISTRICT COURT NO.: 232

DATE PREPARED: 5-12-81 BY: tm

AGENCY: HCDA-C/F Div

NCIC CODE: 2804-05-10

RELATED CASES: HENRY MARTIN SMITH

BAIL: $60,000.00

PRIOR CAUSE NO.: reind. of 341906 R.T.

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

The duly organized Grand Jury of Harris County, Texas, presents in the District Court of Harris County, Texas, that in Harris County, Texas, DIRK VINCENT TERRY hereafter styled the Defendant, heretofore on or about MAY 27, 1981 then and there unlawfully appropriate property, namely, one house and lot located

at 5727 Bridlington, Houston, Harris County, Texas, owned by JAMES DUDLEY JONES, a person having title to the property, hereafter styled the Complainant, of the value of over ten thousand dollars, with the intent to deprive the Complainant of the property and without the effective consent of the Complainant, namely, by deception.

It is further presented that in Harris County, Texas, DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore on or about May 27, 1981, did then and there unlawfully with intent to defraud and harm, JAMES DUDLEY JONES, hereafter styled the Complainant cause by deception the Complainant to sign and execute the document duplicated below which effected the Complainant's property and pecuniary interest.

COUNT TWO

It is further presented that in Harris County, Texas DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore, on or about June 13, 1981, did then and there unlawfully appropriate, namely, one house and lot located at 10014 CHEEVES, Houston, Harris County, Texas, owned by JOHN A. PARKER, a person having a title to the property, hereafter styled the Complainant, of the value of over ten thousand dollars, with the intent to deprive the Complainant of the property and without the effective consent of the Complainant, namely, by deception.

It is further presented that in Harris County, Texas, DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore on or about June 13, 1981, did then and there unlawfully with intent to defraud and harm JOHN

A. PARKER, hereafter styled the Complainant cause by deception the Complainant to sign and execute the document duplicated below which affected the Complainant's property and pecuniary interest.

COUNT THREE

It is further presented that in Harris County, Texas DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore, on or about JUNE 14, 1981, did then and there unlawfully appropriate, namely, one house and lot located at 5530 ELM TREE, Houston, Harris County, Texas, owned by WALTER T. BUHL, a person having a title to the property, hereafter styled the Complainant, of the value of over ten thousand dollars, with the intent to deprive the Complainant of the property and without the effective consent of the Complainant, namely, by deception.

It is further presented that in Harris County, Texas, DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore on or about JUNE 14, 1981, did then and there unlawfully with intent to defraud and harm WALTER T. BUHL, hereafter styled the Complainant cause by deception the Complainant to sign and execute the document duplicated below which affected the Complainant's property and pecuniary interest.

COUNT FOUR

It is further presented that in Harris County, Texas, DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore, on or about JUNE 25, 1981, did then and there unlawfully appropriate, namely, one house and lot located at 1047 LOGENDALE, Houston, Harris County,

Texas, owned by RANSOM W. KAHLIN, a person having a title to the property, hereafter styled the Complainant, of the value of over ten thousand dollars, with the intent to deprive the Complainant of the property and without the effective consent of the Complainant, namely, by deception.

It is further presented that in Harris County, Texas, DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore on or about JUNE 25, 1981, did then and there unlawfully with intent to defraud and harm RAMSON W. KAHLIN, hereafter styled the Complainant cause by deception the Complainant to sign and execute the document duplicated below which affected the Complainant's property and pecuniary interest.

COUNT FIVE

It is further presented that in Harris County, Texas, DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore, on or about JULY 1, 1981, did then and there unlawfully appropriate, namely, one house and lot located at 6227 STANDING OAKS, Houston, Harris County, Texas, owned by DURRELL DERBIGNEY, a person having a title to the property, hereafter styled the Complainant, of the value of over ten thousand dollars, with the intent to deprive the Complainant of the property and without the effective consent of the Complainant, namely, by deception.

It is further presented that in Harris County, Texas, DIRK VINCENT TERRY, hereafter styled the Defendant, heretofore on or about JULY 1, 1981, did then and there unlawfully with intent to defraud and harm DURRELL DERBIGNEY, hereafter styled the Complainant

cause by deception the Complainant to sign and execute the document duplicated below which affected the Complainant's property and pecuniary interest.

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Signature Illegible
Foreman of the Grand Jury

Note: Because legible copies of the Installment Contracts cannot be located, they will not be reproduced here. *See* Tran. at A1 thru A10.

APPENDIX K

APPENDIX K-1

APPENDIX K-2

Petitioner has been unable to locate a copy of his Motion to Supplement, and the State's objections thereto, which were filed in the Court of Appeals. Accordingly, the readers attention is directed to the Court of Appeals opinion, *Smith v. State,* 681 S.W.2d at 77, and to the Court of Criminal Appeals first opinion, *Terry v. State,* slip opinion at 1. *See* Appendix C and B, respectively.

APPENDIX K-3

COURT OF APPEALS
14TH SUPREME JUDICIAL DISTRICT
Civil Courts Building
Houston, Texas 77002

April 7, 1983

Hon. Larry Urquhart
P.O. Box 1808
Brenham, Texas 77833

Re: B14-82-392-CR-Henry Martin Smith, et al vs. State of Texas, from Harris (Tr. Ct. No. 341,905 & 345,042; 209th District Court)

Dear Sir:

Please be advised that on this date in the above cause the Court GRANTED appellant's motion to forward original exhibits, but DENIED as to supplementing the record.

Respectfully,

MARY JANE SMART, CLERK

By /s/ REBECCA MCMAHON
Deputy

cc: Hon. Ray Hardy
District Clerk
Hon. Timothy Taft
Assistant District Attorney

APPENDIX L

APPENDIX L-1

NOS. B14-82-392-CR
B14-82-397-CR

IN THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

NOS. 430,286
345,042

HENRY MARTIN SMITH aka
DON EMMONS and DIRK VINCENT TERRY,
APPELLANTS

vs.

THE STATE OF TEXAS,
APPELLEE

STATE'S MOTION TO DECLARE VOID
APPELLANTS' SUPPLEMENTATION
OF THE RECORDS

TO THE HONORABLE COURT OF APPEALS:

COMES NOW THE STATE OF TEXAS requesting that this Court declare the appellants' supplemented records in the above cause to be null and void and without effect, and as grounds therefor, presents the following:

1. The appellants, Henry Martin Smith and Dirk Vincent Terry, were jointly tried and convicted in the

209th District Court and they gave notices of appeal on May 27, 1982.

2. No designation of material for inclusion in the records pursuant to Article 40.09(2), V.A.C.C.P., was filed by either of the appellants.

3. The records were completed on July 28, 1982, whereupon the appellants filed objections to the records for failure to contain a transcription of the court reporter's notes of the pre-trial or trial proceedings, which objections were granted by the trial court on August 11, 1982.

4. The records were further completed on November 4, 1982, and approved on November 22, 1982, but the approvals were found to be premature because of an extension of time for filing statement of facts granted by this Court until November 24, 1982.

5. The records were again further completed on December 1, 1982, and approved *without objection* on December 17, 1982.

6. On March 28, 1983, the appellants filed a Motion to Forward Original Exhibit and to *Supplement the Appellate Record* (emphasis added) in this Court and the State received a copy of said motion on the same day.

7. The State filed a response to the Motion the very next day asserting the State's *strong opposition* to that portion of the appellates' request pertaining to supplementing the appellate records with matters which the appellants had failed to designate, on the basis that the appellants were circumventing the requirement of Article 40.09(2), V.A.C.C.P. (a copy of said response was mailed to counsel for the appellants).

8. On April 7, 1983, that portion of the appellants' Motion pertaining to supplementing the record with pre-trial motions was denied by this Court.

9. On June 2, 1983, the appellants filed Motions to Supplement the Record with the same pre-trial motions in the trial court without mention on the face of said Motions that this Court had already denied the same motions.

10. No copy of these Motions was served on the State so that the first notice which the State received concerning the appellants' actions came in the form of notification of completion of supplemental records on June 14, 1983.

11. The very next day the State filed objections to such further completion of the records and asked the trial court to order the clerk to cease supplementing the records or, in the alternative, to set the matter on the docket for a hearing on the State's Objections to the Records.

12. On June 16, 1983, the trial court denied the State's request for an order to the clerk to cease supplementing the records but failed to set the matter on the docket for a hearing as requested by the State and required by Article 40.09(7), V.A.C.C.P.

13. On June 28, 1983, the supplemental records were approved and subsequently forwarded to this Court.

14. On July 6, 1983, the State filed an objection to approval of the record and motion to rescind approval on the basis that no hearing had been held on the State's Objections to the Records as required by statute.

15. Several attempts were made to have a hearing on the State's Motion to Rescind Approval which failed due to illness of the trial court, scheduled vacation of the undersigned attorney and difficulties in coordinating the schedules of in-town and out-of-town counsel for the appellants.

16. Finally, on September 30, 1983, the trial court considered the State's objections and issued orders rescinding approval of the supplemental records requiring retrieval of said records in order to hold a hearing pursuant to Article 40.09(7), V.A.C.C.P. (see attached certified copies of said Orders).

17. The appellate clerk of the trial court was unable to carry out the trial court's order due to jurisdictional problems preventing such retrieval once the record is approved and sent forward to this Court.

18. The State herein presents its request to this Court to void the appellants' supplementation of the records in these causes for any or all of the following reasons:

a. The trial court did not have jurisdiction to supplement the records of cases once jurisdiction had been transferred to this Court. Article 44.11, V.A.C.C.P.; *Duncan v. Evans,* ____S.W.2d____ (Tex. Crim. App. No. 69,113, June 29, 1983).

b. The appellants initially attempted to follow the proper procedure for supplementing the record as set out by this Court in *Cooper v. State,* 633 S.W. 2d 336, 337 (Tex. App.—Houston [14th] 1982, D.R. Ref'd), but when that *failed,* the appellants sought to circumvent this Court's authority by *ex parte* motions to supplement in the trial court.

c. Even apart from its lack of jurisdiction, the trial court's supplementation process is flawed by its failure to follow the procedure set out in Article 40.09(7), V.A.C.C.P., and afford the State a hearing on its objections to the records.

WHEREFORE, premises considered, the State requests that this Court declare the supplemental records in the above causes to be null and void and without effect and unworthy of any consideration on appeal. Should this Court see fit to send them back to the trial court as unacceptable or take whatever other action is appropriate the State would be grateful.

Respectfully submitted,

/s/ TIMOTHY G. TAFT
Timothy G. Taft
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002
(713) 221-5826
TBC No. 19608400

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument has been mailed to the following address:

Mr. Larry P. Urquhart
Attorney at Law
207 East Main
Brenham, Texas 77833

/s/ TIMOTHY G. TAFT
Timothy G. Taft
Assistant District Attorney
Harris County, Texas
201 Fannin, Suite 200
Houston, Texas 77002
(713) 221-5826
TBC No. 19608400

Date: October 18, 1983
lvh

NOS. B14-82-392-CR
B14-82-397-CR

IN THE COURT OF APPEALS FOR THE
FOURTEENTH SUPREME JUDICIAL
DISTRICT OF TEXAS
AT HOUSTON

NOS. 430-286
345-042

HENRY MARTIN SMITH aka
DON EMMONS and
DIRK VINCENT TERRY
APPELLANTS

v.

THE STATE OF TEXAS
APPELLEE

AFFADAVIT

I, TIMOTHY G. TAFT, do hereby swear that the matters contained in the foregoing State's Motion to Declare Void Appellants' Supplementations of the Records are true and correct to the best of my knowledge which is based primarily on personal knowledge of the events in question and personal examination of the records in the above two causes.

/s/ TIMOTHY G. TAFT
Timothy G. Taft
Assistant District Attorney
Harris County, Texas

Sworn to and subscribed before me this the 18th day of October, 1983.

/s/ Signature Illegible
Notary Public
My Commission Expires:
6-30-84

APPENDIX L-2

NO. B14-82-392-CR
NO. B14-82-397-CR

IN THE COURT OF APPEALS
FOR THE
FOURTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT HOUSTON

No. 345042
No. 340286

IN THE 209TH DISTRICT COURT
OF HARRIS COUNTY, TEXAS

DIRK VINCENT TERRY AND
HENRY MARTIN SMITH
APPELLANTS

v.

THE STATE OF TEXAS
APPELLEE

APPELLANTS' RESPONSE TO STATE'S MOTION
TO DECLARE VOID THE SUPPLEMENTATION
OF THE APPELLATE RECORDS

LARRY P. URQUHART
MOORMAN & TATE, MOOR-
MAN & URQUHART
207 East Main
Brenham, Texas 77833
(713) 836-5664
Counsel for Appellants

TO THE HONORABLE JUDGES OF THE COURT OF APPEALS:

The trial court has completed and approved a supplemental appellate record in each Appellant's appeal which have been filed in this Court. These supplemental records contain motions to quash filed by both the Appellants prior to trial. A pretrial hearing was conducted on these motions and they were denied. The denial of these motions to quash forms the basis for a ground of error in each Appellant's appellate brief.

The State has objected in the trial court and in this Court to the supplementation of the appellate records. The Appellants file this response to those objections.

The State contends that the trial court's supplementation of the appellate records is flawed by its failure to have given the State a hearing on its objection to the supplemental records. This contention is now moot as the trial court conducted such a hearing on October 20, 1983. At the conclusion of this hearing the trial court overruled the State's objections and ruled that the Appellants are entitled to supplemental records containing the motions to quash on file in the District Clerk's office. Copies of the orders entered by the trial court judge are attached to this brief.

Secondly, the State contends that once the original appellate records were approved and filed in this Court the trial court lost jurisdiction to complete and approve supplemental records in light of Article 44.11, V.A.C.C.P. The Appellants respond that Article 44.11 does not prohibit supplementation of the appellate record pursuant to the trial court's authority under Article 40.09(7), V.A.C.C.P.

In making its argument, the State relies upon the recent Court of Criminal Appeals decision in *Duncan v. Evans,* 653 S.W.2d 38 (Tex. Crim. App. 1983). However, *Duncan v. Evans* dealt with the authority of a trial court judge to remove one appointed attorney and appoint another attorney to represent an indigent appellant in his direct appeal. The case had nothing to do with the trial court's jurisdiction over the appellate record pursuant to Article 40.09(7), *supra.* In contrast, the Dallas Court of Appeals recently addressed the relationship between Articles 44.11 and 40.09(7) in an en banc opinion in which a majority of the court concluded that nothing in Article 44.11 limits the trial court's jurisdiction to make the appellate record speak the truth by preparing and approving a supplemental record even after the original appellate record has been filed in the Court of Appeals. *Jones v. State,* 644 S.W.2d 546 (Tex. App.—Dallas, 1982).

Moreover, the Appellants call the Court's attention to the fact that Article 44.11 has been a part of the Code of Criminal Procedure since its inception in 1965 and existed prior thereto in Article 828 of Vernons Ann. C.C.P. (1925). Over the years, the Court of Criminal Appeals has recognized in several cases the authority of the trial court to approve and forward to the Court of Criminal Appeals a supplemental record, even as late as subsequent to the Court of Criminal Appeals' issuance of an opinion affirming or reversing the conviction. See, e.g. *Hammett v. State,* 578 S.W.2d 699, 706 (Tex. Crim. App. 1979) (supplemental transcript forwarded by trial court after the Court of Criminal Appeals had issued an opinion reversing a capital murder conviction; based on the supplemental record the Court affirmed the conviction

on rehearing); *Schroeder v. State,* 543 S.W.2d 382, 384 (Tex. Crim. App. 1976); *Almand v. State,* 536 S.W.2d 377 (Tex. Crim. App. 1976); *Davis v. State,* 499 S.W. 2d 303 (Tex. Crim. App. 1973). With regard to Article 44.11, the case law interpreting its limitation of the trial court's jurisdiction centers generally on the resulting inability of the trial court to *change* its judgment or the minutes of the court. See, e.g. *Resnick v. State,* 574 S.W. 2d 558 (Tex. Crim. App. 1978); *Colbert v. State,* 331 S.W.2d 328 (Tex. Crim. App. 1960); *Bradshaw v. State,* 331 S.W.2d 52 (Tex. Crim. App. 1960); *Allen v. State,* 65 S.W.2d 311 (Tex. Crim. App. 1933); *Murray v. State,* 31 S.W.2d 1075 (Tex. Crim. App. 1930).

Thirdly, the State argues in the instant cause that the Appellants have failed to follow the procedure for supplementing an appellate record mentioned by a panel of this Court in *Cooper v. State,* 633 S.W.2d 336, 337 (Tex. App.—Houston [14th] 1982). The State responds by pointing out that the *Cooper* opinion does not indicate that the procedure mentioned therein is an exclusive one and, furthermore, a panel of this Court has accepted and relied upon a supplemental record brought to it through the same procedure utilized by the Appellants in this cause in *Deaton v. State,* 642 S.W.2d 247 (Tex. App.—Houston [14th] 1982). In *Deaton* the State, after the appellant's brief was filed in this Court, caused the trial court to conduct a hearing to develop facts not previously reflected in any statement of facts or document in the original appellate record. This supplemental record was then approved and forwarded to this Court long after the original appellate record was approved. The appellant raised the issue of the authority of the trial court to have conducted a hearing and supplemented the record

after the original appellate record had been approved and filed with the Court of Appeals. This Court in its opinion specifically held that Article 40.09(7), V.A.C.C.P., affords the trial court the discretion to hold a hearing and supplement the record to make it speak the truth even after the time periods prescribed elsewhere in Section 7 for approval of the record have expired. *Deaton* is a more recent opinion than *Cooper*.

In conclusion, the Appellants respectfully submit that the trial court possessed the jurisdiction pursuant to Article 40.09(7), V.A.C.C.P., to approve the supplemental records presently filed with this Court and that the Motions to Quash the Indictments found in those supplemental records should be considered by this Court in deciding the Appellants' grounds of error related thereto. The State's Motion to have the supplemental records declared void should be denied.

Respectfully submitted,

/s/ LARRY P. URQUHART
Larry P. Urquhart
MOORMAN & TATE,
MOORMAN & URQUHART
207 East Main
Brenham, Texas 77833
(713) 836-5664
State Bar Number 20415700

Counsel for the Appellants

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing instrument was hand delivered to Mr. Tim Taft of the Harris County District Attorney's Office on October 27, 1983, prior to oral argument.

/s/ LARRY P. URQUHART
Larry P. Urquhart

APPENDIX M

COURT OF APPEALS
FOURTEENTH SUPREME JUDICIAL DISTRICT
OF TEXAS

1307 San Jacinto, 11th Floor
Houston, Texas 77002
Mary Jane Smart, Clerk

December 22, 1983

Hon. Terry Collins
321 Heights Boulevard
Houston, TX 77007

Larry Urquhart
Moorman, Tate, Moorman & Urquhart
207 E. Main St.
P. O. Box 1808
Brenham, TX 77833

Hon. Calvin A. Hartmann
Assistant District Attorney
201 Fannin
Houston, TX 77002

RE: CASE NO. 14-82-00392-CR TRIAL COURT CASE NO. 340,286

STYLE: Smith, Henry Martin aka Don Emmons

V: The State of Texas

Gentlemen:

Please be advised that, on this date, the Court

OVERRULED appellant's motion for rehearing in the above cause.

Respectfully yours,

MARY JANE SMART, Clerk

By: /s/ REBECCA MCMAHON
Deputy

Hon. Ray Hardy
District Clerk, Harris Co.
301 San Jacinto
Houston, TX 77002